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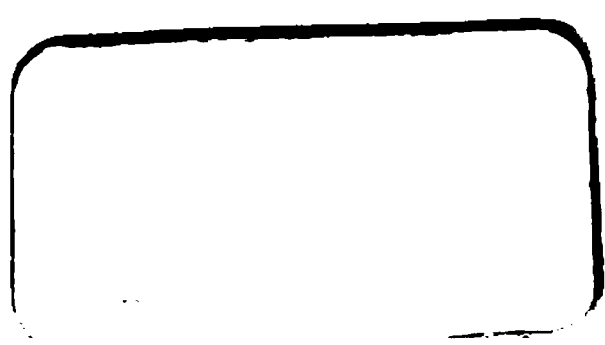
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A
GENERAL ABRIDGMENT
OF
Law and Equity,

ALPHABETICALLY DIGESTED UNDER
PROPER TITLES;

WITH NOTES AND REFERENCES
TO THE WHOLE.

BY CHARLES VINER, ESQ.
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OF OXFORD.

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Judicial, &c.

(A) *Act* Judicial. What is.

1. *GRANTING commissions* by Lord Chancellor is not a judicial act, but only an act of service. D. 212. pl. 33. Pasch. 4 Eliz.

2. *Admitting a copyholder* is not any judicial act; for there need not be any of the suitors there, who are the judges. Le. 289. Trin. 26 Eliz. B. R. in Lord Dacre's Case.

3. *Examining a feme covert copyholder* by the steward of a manor is a judicial act. Cro. E. 717. Mich. 41 & 42 Eliz. C. B. in Case of Erish v. Reeves.

4. A *recognisance* is a judicial act. Arg. Noy. 157. in the grand Case of the Habeas Corpus.

(B) Judicial Opinion, or Determination.

1. JUDICIAL decisions, as far as they refer to the laws of this kingdom, are for the matter of them of *three kinds*. 1st. They are either *such as have their reasons singly in the laws and customs* of this kingdom; as who shall succeed as heir to the ancestor; what is the ceremony requisite for passing a freehold? what estate, and how much the wife shall have for her dower? and many such matters, wherein the ancient and express laws of the kingdom give an express decision, and the judge seems only the instrument to pronounce it; and in those things, the law or custom of the realm is the only rule and measure to judge by, and in reference to those matters, the decisions of Courts are the conservatories and evidences of those laws. Or 2dly. They are *such decisions, as by way of deduction and illation* upon those laws are *formed* or deduced; as for the purpose, whether of an estate thus or thus limited the wife shall be endowed? Whether, if

thus or thus limited, the heir may be barred? and infinite more of the like complicated questions. And herein the rule of decision is; first, the common law and custom of the realm, which is the great substratum that is to be maintained; and then authorities or decisions of former times in the same or the like cases; and then the reason of the thing itself. 3dly. Or they are *such as seem to have no other guide but the common reason of the thing, unless the same point has been formerly decided*, as in the exposition of the intention of clauses in deeds, wills, covenants, &c. where the very sense of the words, and their positions and relations give a rational account of the meaning of the parties, and in such cases the judge does much better herein, than what a bare grave grammarian or logician, or other prudent men could do; for in many cases, there have been former resolutions, either in point, or agreeing in reason or analogy with the case in question; or perhaps also, the clause to be expounded is mingled with some terms or clauses that require the knowledge of the law to help out with the construction or exposition; both which do often happen in the same case; and therefore it requires the knowledge of the law to render and expound such clauses and sentences; and doubtless a good common lawyer is the best expositor of such clauses, &c. Hales Hist. Com. Law, 68, 69. cites Plowden 122, to 130. 140. &c.

[2] So an opinion given in Court, if not necessary to the judgment given of record, but that it might have been as well given, if no such, or a contrary opinion had been broached, is no judicial opinion, nor more than a gratis dictum. Ibid.——But an opinion, though erroneous, concluding to the judgment, is a judicial opinion, because delivered under the sanction of the judges oath, upon deliberation, which assures us that it is, or was, when delivered, the opinion of the deliverer. Ibid.

2. An *extra-judicial opinion*, given in or out of Court, is no more than the prolatum or saying of him who gives it, nor can be taken for his opinion, unless every thing spoken at pleasure must pass as the speaker's opinion. Vaugh. 382. Mich. 25 Car. 2. C. B. In Case of Bole & al. v. Horton.

Justices.

* See Spelm. Gloss. 329. &c. Verbo Iustitia als. Iustitarius. —The

(A) Who have been * *Justiciaries of England*.

[1. 1 H. 2. ROBERT Earl of Leicester [was] made justiciar of England. Speed 456. b.]

first

first justiciaries after the Conquest were *Odo bishop of Baienx in Normandy*, half-brother by the mother to the Conqueror, and *William Fitz Osborn*, who was vice-roy, and had the same power in the North that Odo had in the South, and was the chief in the Conqueror's army. Brady's Preface to the Norman History, 151. (B).—Dugd. Chron. Series, 1.

The next justiciaries were *William earl of Warren in Normandy*, a great commander in the battle against Harold, and *Richard de Benefacta*, alias *Richard de Tonebridge*, son to Gilbert earl of Brion in Normandy, and were constituted in 1073. Brady's Preface &c. 151. (B).—Dugd. Chron. Series, 1.

In a great plea between Lanfrank and the said Odo, *Gotsfrid bishop of Constance in Normandy* was justiciary. Brady's Preface &c. 151. (C).—Dugd. Chron. Series, 1.

In the beginning of WILLIAM RUFUS, Odo was again justiciary. *William de Carilefo bishop of Durham*, a Norman, succeeded Odo. And then followed *Ranulph Flambard* in 1099. Afterwards in the reign of H. 1. in 1100. *Hugo de Bocland* a Norman was justiciary, and after him, his son *Richard Basset* was; then *Roger bishop of Salisbury* was justiciary and chancellor. The next, in the time of King Stephen, was *Henry duke of Normandy*, afterwards King H. 2. And in H. 2. time was *Robert de Bello monte earl of Leicester* in 1168. But *Alberic de Vere*, earl of Guisnes, is said to have been justiciary before him; and after Robert earl of Leicester, *Richard de Lucie* was made justiciary. After him, in 1180, *Ranulph de Glanvil*, that famous lawyer, was made justiciary. After him, *Hugo de Putaceo* commonly called Pufus, Putac, or Pudsey, nephew to King Stephen by his sister, was made justiciary in the North parts beyond Trent, and *William de Longo-Campo*, or Long-Champ, bishop of Ely, was at the same time by Richard the 1st made justiciary on the South parts on this side Trent. Then, after the deprivation of William bishop of Ely, *Walter archbishop of Rouen in Normandy* was made justiciary of all England. Brady's Preface &c. 151. (D)(E)(F) 152. (A)(B)(C). See Dugd. Chron. Series, 1, 2, 3, 4, 5.

[2. William Longchamp, bishop of Ely, Chief Justiciar and Ld. Chancellor to R. 1. Speed 473.]

[3. Fitzpeter Chief Justiciar in the first of John. Speed 487.]

[4. Hubert de Burgh earl of Kent, Chief Justiciar. 1 H. 3. Speed 513.]

[5. And after him, Stephen Segrave. Speed 521. The Chief Justiciar is the minister of regal command in the absence of the King. Speed 487.]

The Chancellor was the first in order on the left hand of the justiciary.

ry, and as he was a great person in Court, so he was in the Exchequer; for no great thing passed but with his consent and advice; that is, nothing could be sealed without his allowance or privy. But the justiciary surmounted him and all others in authority, and he alone was endowed with, and exercised, all the power which afterwards was executed by the four Chief Judges, viz. [3] The Ch. J. of B. R. the Ch. J. of C. B. the Ch. B. of the Exchequer, and the Master of the Court of Wards. Brady's Preface to the Norman History, 153. (B).—As long as the power of the justiciar continued, the Aula Regis was one Court, and only distinguished by the several officers; for all the officers were united under the justiciar, and he was the governor and superintendent of the Courts. G. Hist. View of the Exchequer, 10.

6. Towards the latter end of the Norman period, the power of the Grand Justiciar was broken, so that the Aula Regis, which before was one great Court, where the Justiciar presided, was divided into four distinct Courts, viz. Chancery, Exchequer, King's Bench, and Common Pleas. Gilb. Hist. View of the Court of Exchequer, 7. cites Madd. 2. 4.——It determined about the 45 H. 3. Brady's Preface &c. 154. b.

(B) * Chief Justice.

Fol. 95.

[1.] IN the book called *Modus tenendi Parliamentum*, it is said, that when the parliament is assembled, *debet cancellarius Angliae vel capitalis justiciarius Angliae, scilicet, qui tenet placita coram* Some remains there are to this day of the

great office of the capital justiciary in the Chief Justice of

ram Rege, vel alius idoneus honestus & facundus justiciarius vel clericus per ipsos cancellarium & capitalem justiciarium electus pronunciare causas parliamenti, primo in genere & postea in specie, stando.]

B. R. All England, as to keeping the King's peace and dignity of the Crown, being under his jurisdiction, and is therefore stiled Chief Justice of England. Brady's Preface to the Norman History, 153. (D).

[2. 8 R. 2. cap. 2. *That the Chief Justice of the Common Bench be assigned among others to take assises and deliver gaols, but as to the Chief Justice of the King's Bench, it shall be as for the most part of 100 years last past was wont to be done.* 13 H. 4. cap. 2. *This is confirmed, and that no Chief Justice of the King's Bench be in any wise hereafter made justice to take assises in any county within the realm of England, but only in the county of Lancaster; and that this statute hold place, and be in force as long as it shall please the King for salvation of his prerogative.*]

[3. Rot. Parliamenti 4 H. 4. 1. Numero 49. *The Commons pray, that the Chief Justice of the King's Bench be not justice of assise in any county, nor any justice elsewhere, unless in the same bench.*]

(C) Answer.

1. Be it done as hath been used heretofore.

Justices of Peace.

* Justices of the peace are judges of record, appointed by the Queen to be justices [4] within certain limits for the conservation of the peace,

(A) * Justices of Peace. [*Where they may be named Custodes Pacis.*]

[1. IF an indictment taken upon the statute of 5 Eliz. for using the art of an ironmonger, not being brought up in it as an apprentice for seven years, be certified in B. R. That at the general sessions of the peace of the King for the vill of Andover in the county of Southampton, coram A. B. and C. D. custodibus pacis, ac justiciariis dicti Domini Regis infra villam predictam &c. Though the statute gives power to justices of peace to hear and determine

determine the offences against the statute, yet it is a good indictment taken before them, being named *custodes pacis*, and not justices of the peace as the statute names them; for it is all one. Though I myself objected that every constable is *custos pacis*. For it was said, that the course and form of all *certioraries to remove such indictment* is to name them *custodes pacis*, though the use in *pleadings* be to name them justices of the peace. Pasch. 10 Car. B. R. between the *King* and *Little*, adjudged; this matter being moved by myself in arrest of judgment.]

and for the execution of sundry things comprehended in their commission, and in diverse laws committed unto their charge. Lamb. Eiren. 3. cap. 1.

2. An order made by two justices of peace was said to be made *coram custodibus pacis nec non justiciariis*; it was moved to quash the order; for that all justices of the peace are keepers of the peace, but all keepers of the peace are not justices; and further argued, that since the statute of 34 E. 3. cap. 1. they have not been called *conservatores pacis* only. But the Court over-ruled the exceptions, and adjudged the order good. 11 Mod. 141. Mich. 6 Ann. B. R. the *Queen v. Bonnet*.

(B) Of Conservators of the Peace, and the Original of Justices of Peace.

1. *AFTER* such time as *Queen Isabell* (contending with her husband King Edward the Second) was returned over the seas into England, accompanied with her son Prince Edward (called afterward the Third King of that name) and with Sir Roger Mortimer, and such others of the English nobility, as had, for the indignation of the King, fled over the seas unto her; she soon after got into her hands the person of the old King, partly by the assistance of the Henalders that she brought with her, and partly by the aid of such other her friends as she found ready here: And she immediately caused him (by forced patience) to surrender his Crown to the young Prince. And then also, for as much as it was (not without cause) feared, that some attempt would be made to rescue the imprisoned King, order was taken, that he should be conveyed secretly, and by night watches, from house to house, and from castle to castle, to the end that his favourers should be ignorant what was become of him; yea, and then withal, it was ordained by Parliament, in the lifetime of that deposed King, and in the very first entry of his son's reign (1 Ed. 3. cap. 15.) That in every shire of the realm, good men and lawful (which were no maintainers of evil, nor barretors in the country) should be assigned to keep the peace; which was as much as to say, that in every shire the King himself should place special eyes and watches over the common people, that should be both willing and wise to foresee; and be also enabled with meet authority to repress all intention of uproar and force, even in the first seed thereof, and before that it should grow up to any offer of danger. So that, for this cause, (as he thinks) the election of the simple conservators

(or wardens) of the peace *was first taken from the people, and translated to the assignment of the King.* Lamb. Eiren. 18, 19. cap. 4.

2. By 34 E. 3. 1. *There shall be assigned in every county, for the keeping of the peace, one lord and three or four of the most worthy of the county.* And by 12 R. 2. cap. 10. *In every commission there shall be but six justices assigned.* And by 14 R. 2. c. 11. *there shall be eight.*

{ 5 } 3. Holt Ch. J. said, he knew not whether, at first, justices of peace were more than high constables. But the statute, that made them compleat judges, is that of 34 E. 3. 1 Show. 528. in Case of Harcourt v. Fox.

4. It seems, that the power of such conservators of the peace, whether by tenure, election, or prescription, was *no greater than that of constables at this day, unless it were enlarged by some special grant or prescription.* 2 Hawk. Pl. C. 34. cap. 8. s. 11.

5. The extraordinary conservators of the peace were persons specially commissioned in times of imminent danger either from rebels or foreign invaders, to take care of and defend such a particular district committed to their charge, and to preserve the peace within the limits of it; and these had power to command the sheriff with his whole posse to aid and assist them. 2 Hawk. Pl. C. 34. cap. 8. s. 12.

See Orders
of Justices of
Peace (†)

(C) Their Power within the County.

1. BY 4 E. 3. 2. *There shall be assigned good and lawful men in every county to keep the peace, at the time of such assignment mention shall be made that those who are indicted or taken by the said keepers of the peace, shall not be let to mainprize by the sheriff, if they are not mainpernable by law, and that such as are indicted shall not be delivered but by common law; and the justices of gaol-delivery are impowered to deliver the gaols of those who are indicted before the keepers of the peace, to whom the said keepers shall send their indictments; and the said justices of gaol-delivery shall enquire if the sheriffs and jailors have made deliverance or let to mainprize, any who are so indicted, and are not mainpernable, and punish the said sheriffs &c. accordingly.*

2. 18 E. 3. stat. 2. s. 2. Enacts, that two or three of the best reputation in the counties, shall be assigned keepers of the peace by the King's commission: And at what time need shall be the same with other wise and learned in the law, shall be assigned by the King's commission to hear and determine felonies, and trespasses done against the peace in the same counties, and to inflict punishment reasonably according to the law and reason, and the manner of the deed.

It has been
questioned,
whether us-
ers of peace,
ch, have

3. 34 E. 3. cap. 1. Enacts, that in every county of England shall be assigned for the keeping of the peace one lord, and with him three or four of the most worthy in the county, with some learned in the law, and they shall have power to restrain the offenders, rioters, and
all

all other barretors, and to pursue, arrest, take and chastise them according to their trespasss or offence; and to cause them to be imprisoned and duly punished according to the law and customs of the realm, and according to that which to them shall seem best to do by their discretion and good advisement; and also to inform them, and to inquire of all those that have been pillors and robbers in the parts beyond the sea, and be now come again, and go wandering, and will not labour as they were wont in times past, and to take and arrest all those that they may find by indictment, or by suspicion, and to put them in prison, and to take of all them that be not of good fame, where they shall be found, sufficient surety and mainprize of their good behaviour towards the King and his people, and the other duly to punish, to the intent that the people be not by such rioters or rebels troubled nor endamaged, nor the peace blemished, nor merchants nor other passing by the highways of the realm disturbed, nor put in the peril which may happen of such offenders; and also to hear and determine at the King's suit, all manner of felonies and trespasses done in the same county, according to the laws and customs aforesaid.

not power to enquire of felonies &c. from the general words of this statute, which is express, that the persons assigned to keep the peace, shall have power among other things to hear and determine felonies &c. but the common opinion of lawyers, and the course of precedents are in favour of the con-

trary, which the Serjeant says, he takes to be at present settled law, it having been solemnly adjudged, that the caption of an indictment of trespasss before justices of peace, without adding nec non ad diversas felonias &c. assignat. is naught. Also it seems certain, that even this clause gives them no jurisdiction over offences specially appointed to be determined before justices of oyer &c. Yet inasmuch as all felonies include in them a breach of the peace, it has been a generally approved practice for justices of peace to take examinations of persons brought before them for felony, as they are expressly directed to do by 2 & 3 Ph. & Ma. 10. And also to commit for felony, and to take the informations of prosecutors upon oath, and to bind them over to prosecute, and to commit those who shall refuse to be so bound, if it appear that they can give material evidence; but inasmuch as the statute of Ph. & Ma. directs justices of peace, in case of felony, to certify the examinations and informations to the justices of gaol delivery; they seldom in prudence proceed farther as to any felonies, except petit larcenies. 2 Hawk. Pl. C. Abr. 40, 41. cap. 8. s. 19.—But in the folio edit. it is pag. 38. s. 33.

[6]

4. Indictment was certified *Capt. coram W. N. & sociis suis justiciariis pacis com. E.* but does not say *nec non ad diversas felonias transgress. & alia malefacta in comitat. pradiet. perpetrat. audiend' & terminand'*, and it was of counterfeiting of money, to which the commission did not extend, and therefore it was dismissed. Br. Indictment, pl. 50. cites 2 R. 2. 9.

5. By 15 R. 2. cap. 2. *When forcible entry is made into lands or church-livings, one or more justices of the peace taking sufficient power, and going to the place so kept with force, may* * *commit the offender to the next gaol, there to remain convict by the justices record till he have made fine and ransom to the King. And herein the sheriff and all others shall be assistants in pain of imprisonment and making great fines.*

* But he ought to commit the offender immediately. 8 Rep. 120. 2. (a) — He may commit upon the view of the

force, but then he must [not only do it immediately, but also] make a record of it. Ibid. (c) in Dr. Bonham's Case. — S. P. That it must be *flagranti crimine*; and if he does not commit them immediately upon the view, he cannot commit them afterwards; per Coke Ch. J. Trin. 7 Jac. C. B. in S. C. by the Name of the College of Physicians Case.

6. A man indicted before justices of peace in Bury confessed the felony, and had a coroner, and made appellor in B. R. and the appeal was held void, because justices of peace have no authority

Br. Corone. pl. 25. cites S. C. — Justices of

peace cannot assign a coroner to an approver. 4
 authority to assign a coroner, nor to enquire of treason. Br. Peace, pl. 3. cites 9 H. 4. 1.
 Inst. 165. — Staundf. Pl. C. 144. cap. 55. S. P. and therefore a man cannot become an approver before them. Cites Fitzh. tit. Corone, pl. 457. 9 H. 4.

7. *False imprisonment; the defendant justified, because the plaintiff held a manor with force, and D. F. justice of peace took him, and recorded the force, and sent him to the defendant to be imprisoned in the gaol of D. where the defendant was gaoler &c. Per Yelverton, the statute gave this authority to justices of peace, and not to one justice. Per Newton Ch. J. the statute gave it to one justice, and also to more justices; therefore answer; quod nota. Br. Peace, pl. 4. cites 21 H. 6. 5.*

8. *By 1 E. 4. cap. 2. s. 4. Sheriffs shall deliver all manner of indictments and presentments taken at their tourns or law days, to the justices of peace at their next sessions; and s. 6. the justices of peace shall have power to award process upon such indictments and presentments, as if taken before them; and also to arraign and deliver all persons so indicted.*

9. *In no case one justice alone can make inquisition, if it be not given by statute. Br. Peace, pl. 14. cites 7 E. 4. 18.*

10. *A justice of peace, by his discretion may arrest a man to find surety of peace. Br. Peace, pl. 8. cites 9 E. 4. 3. Per Littleton. — S. P. Br. Judges, pl. 10. cites S. C.*

11. *A justice of peace may examine felony, and inform the jury at sessions; per Catesby, Choke, and Pigot. Per Brian contra, but he may award and take surety of peace alone, but cannot hold sessions alone; and of that which he does in sessions he is excused; contra of speaking out of sessions. Br. Peace, pl. 19. cites 21 E. 4. 67.*

[7] 12. *No recognizances were taken to the King by the ancient conservators of the peace; but now the justices take bail by recognizance to the King. G. Hist. View of the Exchequer, 102, 103. — After the justices of peace were appointed, they issued their warrants in order to apprehend offenders, which they might do, by their being assigned to keep the peace in each particular county; and if it were aailable offender, they bound him over by recognizance, either to appear at the assises or quarter sessions, and likewise bound over the evidence to prosecute; and if the prosecuted or prosecutor did not appear, such recognizance was forfeited; and the clerk of the sessions, or the peace, respectively, estreated such recognizance into the Exchequer. G. Hist. View of the Exchequer, 137.*

If any of them are absent, their fellow justices cannot amerce them, though no sessions can be kept with-
 13. *One justice of peace cannot commit another for breach of the peace. Jenk. 174. pl. 48. cites 3 H. 7. Fitz. Justice de Peace, 3. By all the Justices. For par in parem non habet imperium. — But the sessions of the peace may commit one for breach of the peace. Ibid. cites Lamb. Justice, 385. — And yet it seems to be agreed, that if a justice of peace gives just cause to any person to demand the surety of the peace against him, he may be compelled by*

by any other justice to find such security; for the publick peace requires an immediate remedy in all such cases. 2 Hawk. Pl. C. 41, 42. cap. 8. s. 46.

out them; for their authority at the sessions is all equal,

so that he which is not of the quorum, hath like power with him that is, except in special cases set forth in the commission and statutes; and therefore it was held 3 H. 7. Fitzh. tit. Justice del Peace, 3. that if one, who is not of the quorum, will be so bold as to rebuke one that is of the quorum, he and his companions cannot commit him to prison for it. Lamb. Eiren. 369, 370.

14. If a justice of peace *be ill, and hears of a riot*, he may send his servants to arrest them without writing. Br. Peace, pl. 7. cites 14 H. 7. 8.

And if he hears that riotous persons will come to Dale

to make a riot, he may leave his servants there, and command them, that if they come after, to arrest them, and yet the justice does not see the riot, and this for the *hasty remedy*. Ibid. — But one justice of peace alone cannot punish the riot when it is done, but two &c. But one only may prevent the riot ut supra, and at the time of the riot one only may take surety. Ibid.

15. In false imprisonment, a justice of peace cannot make a warrant to take a felon, unless he be indicted of felony; for he is a justice of record, and ought * to act by the record. Per Fitzh. J. And per Brudnel Ch. J. he cannot make a warrant to arrest a felon, but may make a warrant for keeping of the peace, and he may make any one his officer that he pleases, quod fuit concessum; and he cannot arrest a man for suspicion of felony, unless he has the same suspicion of him himself, and not for the suspicion which others have of him. Br. Peace, pl. 6. cites 14 H. 8. 10.

* Orig. [Overer.]

16. And it is said elsewhere, that one justice of peace alone cannot grant *capias* nor other process, but two justices at least shall do it; and this, sitting the Court in sessions, and not out of Court. Ibid.

17. They have several and distinct authorities and commissions; one to hear and determine, which is kept at a place certain, and is to be adjourned to a certain time; and a commission of the peace, by virtue whereof they are to keep their ordinary sessions; and therefore an indictment for forging a false deed taken before them *ad sessionem pacis* was discharged. Cro. E. 87. Hill. 30 Eliz. B. R. Smith's Case.

18. By 21 Jac. 1. cap. 4. Actions popular, which may be presented before justices of assise, nisi prius, gaol delivery, oyer and terminer, or of peace, shall be prosecuted only in the counties where the offences were committed, except for recusancy, maintenance, champerty, buying of titles, concealing of customs, &c. or transporting of gold, silver, munition, wooll, wooll-fells, or leather.

This statute ordains many popular actions upon penal statutes, to be sued at this day before justices of

peace in the country, and not elsewhere; but it is expounded, not to extend to penal statutes, where the offence consists only in non-feasance, as recusancy &c. Jenk. 228. pl. 94.

19. In indictment against a sheriff's bailiff for extortion, it was held, that justices of peace have no power themselves to give and tax damages to the party. Jo. 380. Hill. 9 Car. B. R. the King v. Lamferne.

But the jury ought to find the damages, and then they might treble

treble them. But it is doubtful if the act of 23 H. 6. cap. 10. (upon which the indictment was founded,) extends to extortions, unless taken upon arrests; and judgment was reversed. Jo. 438. 448. 449. Hill. 11 Car. B. R. Brunlden's Case.—*ab. Bumpsted's Case.*

They cannot inquire, try, and determine civil of- * 20. Justices of peace cannot *try one that is indicted, the same day that he is indicted.* Jo. 379. Hill. 11 Car. B. R. the King v. Lamferne.

fences as extortion, in one and the same day; for the party ought to have convenient time to prepare for his trial. Cro. C. 448. Hill. 11 Car. B. R. Bumpstead's Case.—So in case of *barretry*; and because they did, judgment was reversed. *But* the Court said, that *in cases of life, where the offender is in custody,* they may try it the same day. Sid. 334, 335. Pasch. 19 Car. 2. B. R. the King v. Browne.—(But the reporter adds, that this opinion and difference, as it seems to him, is founded more upon authorities than upon reason; which wills, that the offender shall have so long time to advise in case of life, as in case of less offences. Ibid. 335.)—*But* Trin. 14 Jac. B. R. where one had been indicted at the sessions of the peace at W. for a common *barreter*, and at the same sessions arraigned thereupon, and *traversed it, and a venire facias awarded immediately to try it, and he was convicted and fined 40 l. and forthwith committed to prison till he should satisfy it, the indictment and proceedings were removed by certiorari, and the party removed by habeas corpus, who would have discharged himself by exceptions to the indictment, it was resolved, that he could not; because judgment being given, he cannot discharge it without bringing a writ of error.* Whereupon he brought error, and assigned for error as before, that the trial and awarding the *venire facias* the same sessions he was indicted, could not be good; for that ought to be made returnable at the next sessions, and not the next day; and cited the 22 E. 4. Corone 44. *sed non allocatur.* For the *party being present may be tried the same day, as well as at another time, and so is the common experience.* And they conceived, that *presently after the conviction they may impose a fine, and commit to prison until it be paid, which is the execution for the King.* Cro. J. 404. Trin. 14 Jac. B. R. Rice v. the King.

21. It was said, that they cannot *take inquisitions of riots, &c.* but in their sessions. Quære. Sid. 186. Pasch. 16 Car. 2. B. R. the King v. Cuffens & al.

22. They may enquire of *libels.* Sid. 271. Trin. 17 Car. 2. B. R. the King v. Sumner and Hilliard.

* 3. P. for selling earthen ware in London. 5 Mod. 149. Hill. 7 W. 3. the King v. Clough.

23. The defendant was indicted before the justices of peace in their sessions, upon the statute of 2 & 3 Ph. & M. cap. 11. he being a *clothworker, and not living in a city, borough, or town corporate, and yet keeping in his house more than one woollen loom, by reason whereof he had forfeited forty shillings per week.* An exception was taken to this indictment, for that *the justices had not power to take it before them; for they cannot by law hold cognizance of pleas upon * penal statutes, without an express power given them by these acts, and here being no such authority allowed by this act, the indictment was for that reason quashed.* 4 Mod. 379. Hill. 6 W. & M. B. R. the Queen v. Buggs.

24. Though before the 13 & 14 Car. 2. the justices of peace could not *make constables, yet they could swear them; and though as to the form of their commission and authority they are of late, yet they have the same power as conservators of the peace at common law had: All the conservators power is vested in the justices, and in that quality they shall be intended to swear constables.* Per Holt Ch. J. Hill. 7 W. 3. 12 Mod. 88. Fletcher v. Ingram.

25. Where a *special authority* is given to justices of peace *out of sessions,* it ought to appear that that authority was *exactly pursued;* per Holt Ch. J. 2 Salk. 475. Mich. 8 W. 3. in the Case of the Inhabitants of Chittington Parish v. Penhurst.

26. Con-

26. Conservators of the peace did *commit* at common law, and it *was incident* to their office, as it is to the office of justices of peace, who are not authorised by any express words in their commission, but do it *ratione officii*. 1 Salk. 347. Trin. 7 W. 3. B. R. in Case of the King v. Kendal and Roe.

27. It was said by Holt Ch. J. to have been held by Ld. Ch. J. Hale, that if a justice of peace *direct his warrant to any particular person*, he might execute it. 1 Salk. 347. in Case of the King v. Kendal and Roe.

28. 7 & 8 W. 3. cap. 6. §. 1. Enacts that *for the more easy recovery of small tithes, where the same do not amount to above the yearly value of 40 s. from any one person, every person shall truly set out, and pay all small tithes, and compositions for the same, with all offerings, oblations, or obventions, to the rectors, vicars, and other persons to whom they shall be due, according to the rights, customs, and prescriptions used within the parishes; and if any person shall substract, or fail in the payment of such small tithes, offerings, &c. twenty days after demand, it shall be lawful for the persons, to whom the same shall be due, to make their complaint in writing unto two justices of peace within the place where the same shall grow due, neither of which justices is to be patron of the church whence the tithes arise, nor interested in such tithes, &c.* [9]

S. 2. *If any complaint shall be brought to two justices of peace, concerning small tithes, offerings, &c. the justices are required to summon in writing, by reasonable warning, every person against whom complaint shall be made; and after his appearance, or upon default of appearance, the said summons being proved upon oath, the justices shall proceed to hear and determine the complaint; and upon the proofs, shall in writing adjudge the case, and give such compensation for such tithes &c. as they shall judge reasonable, and also costs, not exceeding ten shillings.*

S. 3. *If any person shall neglect by ten days after notice, to pay any such sum, as upon such complaint shall, by two justices, be adjudged, the constables and churchwardens of the parish, or one of them, shall, by warrant of the said justices, distrein the goods of the party: and after detaining them three days, in case the sum adjudged together with reasonable charges be not paid, shall make publick sale of the same.*

S. 4. *It shall be lawful for all justices of peace, in the examination of all matters offered to them by this act, to administer an oath to any witness.*

S. 5. *This act shall not extend to any tithes &c. within London, nor to any other city or town corporate, where the same are settled by act of parliament.*

S. 6. *No complaint concerning any small tithes &c. shall be determined by justices of peace, unless the complaint be made within two years after the same tithes &c. become due.*

S. 7. *Any person aggrieved by any judgment given by two justices, may appeal to the next quarter sessions; and if the justices then present find cause to confirm the judgment, they shall give costs against the*

Justices of Peace.

the appellant, to be levied by distress and sale of goods; and no proceedings by virtue of this act, shall be removed or superseded by certiorari, or other writ, unless the title of such tithes &c. be in question.

S. 8. Where any person complained of for subtracting small tithes &c. shall before the justices insist upon any prescription, composition, or modus, agreement or title, and deliver the same in writing to the justices subscribed by him, and shall then give, to the party complaining, security to the satisfaction of the justices, to pay all such costs and damages, as upon a trial at law shall be given against him, in case the said prescription &c. shall not be allowed, the justices shall forbear to give judgment in the matter, and the persons complaining shall be at liberty to prosecute such persons, for their subtraction, in any other Court.

S. 9. Every person who shall, by virtue of this act, obtain any judgment, or against whom any judgment shall be obtained, before justices of peace for small tithes &c. shall cause the judgment to be enrolled at the next quarter sessions; and the clerk of the peace is required, on tender thereof, to inrol the same; and he shall not ask for the inrolment, any fee exceeding one shilling.

S. 10. If any person against whom such judgment shall be had, shall remove out of the county &c. after judgment, and before the levying the sum; the justices who made the judgment, or one of them, shall certify the same to any justice of peace of such other county, wherein the person shall be inhabitant; which justice is required, by warrant directed to the constables or church-wardens of the place, to levy the sum adjudged, upon the goods of such person.

[10] S. 12. The justices who shall hear and determine any of the matters aforesaid, shall have power to give costs, not exceeding ten shillings, to the party prosecuted, if they find the complaint false and vexatious; which costs shall be levied in manner aforesaid.

S. 13. If any person shall be sued for any thing done in execution of this act, and the plaintiff shall discontinue &c. such person shall recover double costs.

S. 14. Any person who shall begin any suit or recovery of small tithes &c. in his Majesty's Court of Exchequer, or in any Ecclesiastical Court, shall have no benefit by this act for the same matter.

S. 15. This act shall continue three years, &c.

This act is made perpetual by 3 Annæ, cap. 18.

29. By the statute of 1 E. 3. 16. the justices of peace have a power to inquire of all public nuisances; per Holt Ch. J. in an indictment for not repairing a common bridge. 6 Mod. 255. Mich. 3 Annæ, B. R. in Case of the Queen v. Saintiff.

30. Their power is created by act of parliament within time of memory, and they have no other authority than what is thereby given them; and the general words of their commission *de omnibus aliis transgressionibus & malefactis quibuscunque*, must be understood of such crime, as they have power over by the several statutes which created or enlarged their power. *So it is of perjury at common law; but perjury upon the statute 5 Eliz. is indictable before the justices

*In arrest of judgment in an indictment of perjury, before justices of peace, exception was taken, that

justices of sessions, because it is so appointed by the particular provision of that statute. Per Cur. 1 Salk. 406. Mich. 9 Annæ, in Case of the Queen v. Yarrington.

justices of
peace have
no power by
their com-
mission, to

take *indictments of perjury and battery*, but the Court doubted, and seemed afterwards of opinion, that they might. Mich. 4 Annæ, B. R. 11 Mod. 67. the Queen v. Gunn.

31. 2 Geo. 2. cap. 28. §. 11. *No license shall be granted to keep a common inn or alehouse, or to retail brandy, but at a general meeting of the justices acting in the division where the person dwells; and all licenses granted to the contrary shall be void.*

32. The authority given to justices of the peace by the statutes, and usually exercised by them, chiefly concern *alehouses*, apprentices, *badgers*, bail, bakers, bastards, beer, and ale; *carriages*, and prizes of land carriages; church-wardens, constables, cottages, cursing and swearing; *drunkenness*, *excise*, *felonies*, forcible entry and detainer; fore-stallers, *games* not lawful; the game, and game-keepers; guns, greyhounds, setting dogs, ferrets, snares, nets, hares, partridges, pheasants, pigeons, hawks, fish, deer, &c. gaols, *hackney coaches*, hedge breakers, highways, and surveyors of highways; houses of correction, *labourers*, leather, Lord's day; defaults about *money*, *poor*, &c. as setting them to work, settling them in a parish, or removing them from a parish; and overseers of the poor, papists, *rates*, and parish taxes; regrators, riots, robbing orchards, &c. *servants*, soldiers, and providing carts and carriages for them upon their march; small *tithes*, treasurers of the county; *vagabonds* and vagrants; *wages*, waggons, and waggoners, weights and measures, wood-stealers, and destroyers of timber, or other trees, &c. 4 Vol. R. S. L. 111, 112.

33. 11. Geo. 2. cap. 19. §. 4. *Where goods carried off the premises fraudulently or clandestinely, to prevent the landlord from distraining, shall not exceed the value of 50 l. it shall be lawful for the landlord, his bailiff, servant or agent, to exhibit a complaint in writing against such offenders before two justices of peace, residing near the place, not being interested in the tenements; who may summon the parties, and examine the fact, and all witnesses upon oath; or if quakers, upon affirmation; and in a summary way determine whether such persons be guilty of the offence, and inquire of the value of the goods by them fraudulently carried off or concealed; and upon proof of the offence, by order of the said justices may adjudge the offenders to pay double the value of the goods to such landlord, his bailiff, servant, or agent, as the justices shall appoint; and in case the offenders, having notice of such order, shall neglect so to do, shall by warrant levy the same by distress and sale of goods; and for want of distress, may commit the offenders to the house of correction, to be kept to hard labour for six months, unless the money be sooner satisfied.*

[11]

S. 5. *It shall be lawful for any person aggrieved by such order of the two justices to appeal to the next quarter sessions, who shall hear and determine such appeal, and give costs to either party.*

S. 6. *Where the party appealing shall enter into a recognizance with*

with surety in double the sum ordered, with condition to appear at such quarter sessions, the order of the two justices shall not be executed in the mean time.

S. 16. If any tenant, holding tenements at a rack-rent, or where the rent reserved shall be full three-fourths of the yearly value of the premises, who shall be in arrear for one year's rent, shall desert the premises, and leave the same uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears; it shall be lawful for two justices of peace, (having no interest in the premises) at the request of the landlord, his bailiff, or receiver, to go upon and view the same, and to affix on the most notorious part notice in writing what day (at the distance of fourteen days at least) they will return to take a second view; and if upon such second view, the tenant, or some person on his behalf, shall not appear and pay the rent in arrear, or there shall not be sufficient distress upon the premises, the justices may put the landlord into possession, and the lease to such tenant, as to any demise therein contained only, shall become void.

S. 17. Provided, that such proceedings of the justices shall be examined into, in a summary way, by the next justices of assize; and if they lie in London or Middlesex, by the judges of the Courts of King's Bench or Common Pleas; and if in the counties palatine, there before the judges thereof; and if in Wales, before the Courts of Grand Sessions; who are empowered to order restitution to be made to such tenant, together with his costs, to be paid by the landlord, if they shall see cause for the same; and in case they shall affirm the act of the justices, to award costs not exceeding 5 l. for the appeal.

(D) Their Power out of the County, or within Corporations, where there are Particular Justices.

And the grant was, that the justices of the franchise should have the like authority, as the justices

1. **WHERE** the grant is, that the abbot of St. Albans shall make justices of peace there, and that the other justices of the county shall not intermeddle, there the justices of the county are restrained, so that they cannot intermeddle of things within the franchise; and if they do, it is coram non judice. Br. Patents, pl. 111. cites 20 H. 7. 6. 8. Per Fineux Ch. J.

of the county of Hertford; and per Fineux, such general grant, referring to a certainty as above, is good in the case of the King. Ibid.—Quere, if the same point as in the principal case has not lately been determined accordingly, in a case of the City of Salisbury.

S. C. cited Cro. C. 212. in the Case of He-lier v. Ben-hurst (Hundred).—The point, that the im-

2. If a justice of peace of one county pursues one into another county, for felony done in the county of which he is justice, and there takes him in the other county, it is held, that he is his prisoner in the county where he takes him, and ought to imprison him in the other county, and cannot carry him to gaol in the county where he did the felony; for he is not his prisoner there; because his pursuit in such case is not material, and then he has nothing to do

do in the county where he took him, any more than any other person. And this proves, that a justice of peace in one county has no authority in another county. Arg. Pl. C. 37. a. in Case of Platt v. the Sheriff of London.

prisonment of him must be in the foreign country, is by * Brian, who

said, that for his deliverance he might be removed by writ. But it was debated, whether he ought to carry him to the gaol where he did the felony; and it is there said, that some thought that he should, because he may be more readily there delivered. See the Year-Book of 13 E. 4. 9. a. in Case of the Lord Say v. the Town of Nottingham. [* 12]

3. One was robbed in Berks, and afterwards made oath thereof in London before a justice of peace of Berks, and who dwelt within the said county, but at the time of taking the oath was at his chambers in the Temple. The oath was pursuant to the statute, and no mention made where it was taken; but the jury found it to be in London. The justices were at first divided, upon the question, whether the oath was well taken or not? But after, upon putting the case to the justices at Serjeant's Inn in Fleet-street, who were all of opinion, that the oath was well taken, the justices of B. R. upon conference among themselves, agreed to give judgment for the plaintiff, which was done accordingly. And Hyde, who delivered the opinion of the Court, gave for reason, that this was a *particular case, and this oath is only taken by the justice of peace, not virtute officii, but as a person designed by the statute for this particular purpose*; and that it was not their opinion, that in other cases, where a justice does a thing by virtue of his office, that he may do it out of the county; but on the contrary, they were of opinion, that such acts would not be good, and so this is a singular case, and stands upon a particular reason different from the other Cases. Jo. 239. Pasch. 7 Car. B. R. Helier v. the Hundred of Benhurst.

Cro. C. 211. S. C. and there, page 213. it was held by Jones and Croke]. that there is a difference where a justice of peace does an act to compel another to perform [any thing] as to imprisonment any for non-performance, or to command one for any offence to be imprisoned, such acts cannot be done in any place but where his jurisdiction extends.

But it is an usual course for justices of peace to take informations against offenders in any place out of the county to prove offences in the county where they are committed. And sometimes they take recognizance to prosecute; and such recognizances taken out of the county by voluntary assent of the parties bind well enough and are usual. But they cannot compel any out of the county to enter into a recognizance; for they cannot use coercive power out of the county. And upon this the Court would advise; and afterwards the judgment was given as in the case itself above.

4. The magistrates of a town had a mind to turn the clerk of the market out of his place, and procured a forcible entry to be made on the market-house, to get the possession thereof from him; and the justices of the town being, as was suggested, in the faction, would not inquire of the force. And per Holt Ch. J. *if all the justices of a corporation are concerned in a force, and will not inquire of it, the next justices of the county shall do it; for their denying to do it, is a forfeiture of their exemption from the county*; and a mandamus was granted, jointly and severally, to all the justices of the town, to inquire of the force; for the Court would not suppose them all guilty. 6 Mod. 164. Pasch. 3 Annæ B. R. Caly v. Hardy, Gollon, & al. Justices of the Peace of the Town of Ipswich.

Holt's Rep. 407. S. C. verbatim, only leaves out the word (not) at the end of the Case.

5. It seems to be a good general rule, that no process without writ

writ can be well awarded on any indictment, or appeal, &c. from any Court, out of the county wherein it sits. 2 Hawk. Pl. C. 281, 282. cap. 27. f. 1.

6. It seems questionable, whether justices of peace, being *assigned* by their commission to *hear and determine felonies*, are as well within the meaning as letter of the 5 E. 3. 11? For, as on the one side it may be argued, that this, being a remedial law, ought to receive as favourable and large an interpretation as the words will admit; so on the other side it may be said, that the preamble of the statute making mention as well of persons appealed, as of those who are indicted, cannot be thought to have any manner of regard to justices of the peace before whom no appeal lies; and nothing can be more reasonable, than to construe one part of a statute by another. 2 Hawk. Pl. C. 282. cap. 27. f. 3.

[13] 7. But by 22 H. 8. 5. par. 5. *justices of peace of the shire, &c. wherein any decayed bridge shall be, &c. shall make process into every shire within this realm, against any persons who ought to amend such bridge, being presented before them to be decayed, &c.*—Also they have the like power by other statutes in many other cases. 2 Hawk. Pl. C. 282. cap. 27. f. 4.

8. 9 Geo. 1. cap. 7. f. 3. Enacts that, *justices of peace dwelling in any city, or precinct, that is a county of itself situate within the county at large, for which he shall be appointed a justice, though not within the same county, may grant warrants, &c. take examinations, and make orders for any matters, which one justice may act in, at his own dwelling-house, though it be out of the county. Provided that nothing therein shall give power to the justices for the counties at large, to hold their quarter-sessions in cities, or towns, that are counties of themselves, nor impower justices, &c. of the counties at large to act in any matters arising within cities or towns, which are counties of themselves.*

* See the several other proper titles, as **FORCIBLE ENTRY,** &c. for more matters relating to this head.

(E) * Power and Jurisdiction, What. By what Words.

1. **T**HE justices of peace, by the general words of their commission, have power to punish any offences, against any statute made concerning the peace of the nation; per Holt Ch. J. 4 Mod. 51. in Case of the King v. Alsop.

The principal case was upon the statute 2 & 3 E. 6.

2. The [bare] naming them in an act of parliament doth not give them more authority than they had before; per Holt Ch. J. 1 Show. 339. Mich. 3 W. & M. in Case of the King v. Alsop.

14. against shooting of hailshot (since repealed) in which there was a proviso, that it should not restrain those from shooting who had authority so to do by the 33 H. 8. 6. and that all others who should presume to shoot should present their own names to the next justice of peace who is to see them recorded at the sessions, whence it was argued, that it seemed to be an offence inquirable there, to which it was answered, That the names of such persons were to be presented and recorded at the sessions, that the

the King might know what men were able to serve him in his wars; and it was agreed that the party might be indicted for the offence before justices of oyer and terminer, but not before justices of peace for want of jurisdiction. 4 Mod. 49. to 51. the King v. Alsop.

3. The general words of the commission of justices of peace, *de omnibus aliis transgressionibus & malefactis quibuscunque*, must be understood of such crimes as they have power over by the several statutes which created or enlarged their power. 1 Salk. 406. the Queen v. Yarrington.

(F) Of the *Warrants*, and the *Form*, &c. of them.
In General.

1. **A**NY justice of peace may by word of mouth authorise any one to arrest another, who shall be guilty of an actual breach of the peace in his presence, or of a riot in his absence. Also, he may grant his warrant to arrest a man for treason, felony, *præmunire*, or any other offence against the peace; also, wherever a statute gives any one justice of peace jurisdiction over an offence, or power to require a person to do any certain thing, it impliedly impowers such justice to bring the party before him, &c. but anciently it was holden, that one justice of peace could not make out a warrant for an offence cognizable only by a sessions of two or more justices, but the contrary opinion seems now to be established by constant experience. And by the like experience, the power of a justice of peace of granting warrants for felony, or other misdemeanor, before any indictment found, seems also at this day to be established; yet since the old books are generally to the contrary, it is adviseable for justices of peace to be very cautious in this particular, especially where the crime for which the warrant is made, cannot be heard and determined by the justice who made it, without the concurrence of others. 2 Hawk. Pl. C. Abr. 84. cap. 13. f. 10. [14]

2. It ought to be under the hand and seal of the justice who makes it out. 2 Hawk. Pl. C. 85. cap. 13. f. 21.

3. And to set forth the year and day when made, that in an action brought upon an arrest made by virtue of it, it may appear to have been prior to such arrest. 2 Hawk. Pl. C. 85. cap. 13. f. 22.

4. It is safe, but perhaps not necessary, in the body of the warrant to shew the place where it was made; yet it seems necessary to set forth the county in the margin, at least, if it be not set forth in the body. 2 Hawk. Pl. C. 85. cap. 13. f. 23.

5. It may be made either in the name of the King, or of the justice himself, as appears from the precedents therein before referred to. 2 Hawk. Pl. C. 85. cap. 13. f. 24.

6. If it be for the peace, or good behaviour, it is adviseable to set forth the special cause upon which it is granted; but if it be for treason or felony, or other offence of an enormous nature, it is

said, that it is *not necessary* to set it forth; and it seems to be rather discretionary, than necessary to set it forth in any case. 2 Hawk. Pl. C. 85. cap. 13. f. 25.

A justice of peace ought not to make a general warrant, nor can a

constable break a house in the *night*, or at any time unless in the case of felony and treason. 1 Buls. 146. Foster v. Hill.—A justice of peace may make a warrant to *bring a person before himself* to find sureties for the good behaviour, and it will be good and sufficient in law; for most times he who makes the warrant has the best knowledge of the matter, and therefore more apt to do justice in the case; per Wray Ch. J. 5 Rep. 59. b. Hill. 32 Eliz. B. R. in Foster's Case.

8. It may be *directed* to the sheriff, bailiff, constable, or to any *indifferent person* by name, who is no officer; for that the justice may authorise any one to be his officer, whom he pleases to make such; yet it is most adviseable to direct it to the constable of the precinct wherein it is to be executed; for that no other constable, and a fortiori no private person is compellable to serve it. 2 Hawk. Pl. C. 85. cap. 13. f. 27.

(G) Warrants *executed* How.

1. **A** Bailiff or a constable, if they be sworn and commonly known to be officers, and act within their own precincts, need not *shew their warrants* to the party, notwithstanding he demand the sight of it; but these and all other persons whatsoever making an arrest, *ought to acquaint the party* with the substance of their warrants, and that all private persons to whom such warrants shall be directed, and even officers, if they be not sworn and commonly known, and even these, if they act out of their own precincts, must shew their warrants, if demanded. 2 Hawk. Pl. C. 85, 86. cap. 13. f. 28.

2. The *sheriff* having such warrant directed to him, *may authorise others to execute it*; but every other person to whom it is directed, *must personally execute it*; yet it seems, that any one may lawfully assist him. 2 Hawk. Pl. C. 86. cap. 13. f. 29.

3. If a warrant be generally *directed to all constables*, no one can execute it out of his own precinct; but if it be directed to a *particular constable by name*, he may execute it any where within the jurisdiction of the justice. 2 Hawk. Pl. C. 86. cap. 13. f. 30.

(H) Of their taking *Bail*.

1. **B** Y 3 H. 7. 3. two justices of peace quor. unus are impowered to bail persons, who areailable by law, until the next general sessions or gaol-delivery, where they shall certify the same on pain of 10 l.

2. Wherever

2. Wherever a man may be taken up by one justice of peace, *one justice of peace may bail him.* 6 Mod. 179. per Holt Ch. J. Trin. 3 Annæ. Anon.

3. Where 2 justices of peace are ready [requir'd] to bail one, they *ought to be both present* to do it; and [it is] not enough that one of them should first sign the recognizance, and then send it to another, though the contrary be sometimes irregularly practised; per Holt Ch. J. 6 Mod. 180. Trin. 3 Annæ. B. R. the Queen v. West.

4. A justice that has *power to set a fine has power to bail*; for he is not obliged and bound to commit him; but after he is once committed in execution it is too late to move for bail; per Holt Ch. J. 11 Mod. 52. pl. 25. Pasch. 4 Annæ. B. R. Anon.

(I) Of their Proceedings.

1. 3 H. 7. *EVERY justice of peace, that shall take any recognizance cap. 1. for keeping the peace, shall certify the same to the next sessions, that the party may be called, and if he make default, the same to be recorded, and the recognizance, with the record of the default, certified into the Chancery, or before the King in his bench, or into the Exchequer.*

2. If justice of peace does *not observe the form prescribed by the statute*, there needs no writ of error, but what he does is void and *coram non judice*; but if the justice acts according to the statute, then neither King's Bench nor justices of peace can redress it, nor *set at liberty* the party. Jo. 171. Hill. 3 Car. B. R. Cole's Case.

(K) Their Qualification.

1. *BY 1 E. 3. cap. 18. the King, for the better keeping and maintaining the peace, willetb, that in every county good men and lawful, which are not maintainers of evil, or barretors in the country, shall be assigned to keep the peace.—And by 18 E. 3. 2. two or three of the best reputation in the counties, shall be assigned keepers of the peace by the King's commission.—And by 34 E. 3. cap. 1. in every county shall be assigned for keeping the peace, one lord, and three or four of the most worthy men in the county, with some learned in the law.—And by 2 H. 5. stat. 2. cap. 1. they shall be made of the most sufficient persons dwelling in the counties; but lords and justices of assise may be made justices of the peace though they dwell out of the counties.*

2. 13 R. 2. 7. *Justices of peace shall be made of the most sufficient knights, esquires, and gentlemen of the law of the county.*

3. 2 H. 5. stat. 1. cap. 4. *The justices of peace who are of the quorum, shall be resident in the same county, except lords, judges, serjeants at law, and the King's attorney.*

One was indicted for fitting as a justice of peace in Buckinghamshire not having 20 l. a year contra formam statuti; but it was quashed, 1st, Because no indictment lies of it; for the statute limits it to be punishable by debt, according to the common law. 2dly, A man of law and corporations are excepted out of the statute, and it is not shewn in the indictment, that he was not a man of law, nor one of the corporation. 3dly, No time of the sitting is shewn; for if he had 20 l. at the time, though afterwards he had not, he is not punishable; and for this principally the indictment was quashed. 2 Roll. R. 247. Mich. 20 Jac. B. R. Anon.

4. 18 H. 6. 11. No justice of peace shall be made who hath not lands, or tenements of the value of 20 l. a year. And if any be put in commission who hath not lands of that value, he shall give notice to the Chancellor, who shall put another in his room; and if he do not give notice within a month after he knows of such commission, or if he sit, or make any warrant, or precept by force of such commission, he shall forfeit 20 l. to be divided between the King and the prosecutor, and be put out of commission.

ti; but it was quashed, 1st, Because no indictment lies of it; for the statute limits it to be punishable by debt, according to the common law. 2dly, A man of law and corporations are excepted out of the statute, and it is not shewn in the indictment, that he was not a man of law, nor one of the corporation. 3dly, No time of the sitting is shewn; for if he had 20 l. at the time, though afterwards he had not, he is not punishable; and for this principally the indictment was quashed. 2 Roll. R. 247. Mich. 20 Jac. B. R. Anon.

Saving for towns corporate.

5. 2 Mar. sess. 2. cap. 8. Enacts, that no person, having, or using the office of a sheriff of any county, shall use or exercise the office of a justice of peace, by force of any commission or otherwise, in any county where he shall be sheriff, during the time only that he shall exercise the said office, or sheriffwick; and that all acts done by such sheriff by authority of any commission of the peace, during the time aforesaid shall be void.

6. 5 Geo. 2. cap. 18. s. 1. No person shall be capable of being a justice of peace for any county in England or Wales, who shall not have an estate of freehold, or copyhold in possession, for life, or some greater estate, or for years determinable upon life, or for a certain term originally created for 21 years or more, in lands or hereditaments in England or Wales of the yearly value of 100 l. above incumbrances.

S. 2. No attorney, solicitor, or proctor, shall be capable to be a justice of peace in England or Wales, during such time as he shall continue in practice.

S. 3. If any person, who shall not be qualified according to this act, shall take upon himself the office of a justice of peace, or do any act as such he shall for every offence forfeit 100 l. one moiety to the King, and the other moiety to such as will sue for the same.

S. 4. This act shall not extend to any city, town, or liberty, having justices of peace within their limits.

S. 5. Nothing in this act shall incapacitate any lord of parliament, or the eldest son, or heir apparent of any lord of parliament, or of any person qualified to serve as knight of a shire by stat. 9 Anna, cap. 5. to be a justice of peace for any county.

S. 6. Nothing in this act shall incapacitate the officers of the Board of Green-cloth from being justices of peace within the verge of his Majesty's palaces, or to incapacitate the commissioners and principal officers of the navy, or the two under secretaries in each of the offices of principal Secretary of State, from being justices of peace for such maritime counties and places where they usually have been justices.

S. 7. This act shall not extend to any of the heads of colleges or halls in the universities of Oxford and Cambridge, but that they may be

be justices of peace in the counties of Oxford, Berks and Cambridge, and the cities and towns within the same.

7 Geo. 2. cap. 10. s. 3. The act 5 Geo. 2. cap. 18. shall not extend to deprive the vice-chancellor of the university, or the mayor of Cambridge, from being justices of peace in the county.

(L) Punishable. In what Cases.

[17]

1. **A** Justice of peace by his discretion may arrest a man to find surety of peace, and though he lets him go at large without surety, yet the party cannot punish him; because he is a judge of record. Br. Peace, pl. 8. cites 9 E. 4. 3.

S. P. per Littleton J. quod non negatur; quod nota, that action

does not lie against a judge of record. Br. Judges, pl. 10. cites S. C.

2. The statute of 3 H. 7. cap. 3. is that the justice shall forfeit 10 l. if he does not certify the recognizance at the next sessions. Br. Peace, pl. 11. cites 2 H. 7. 11. ——— It should be (2 H. 7. 1. pl. 2.)

An information was exhibited against one put out of commission

of the peace, for having, while in the commission, compounded and not returned recognizances to the sessions and taking 20 s. of every unlicensed alehouse, and converting it to his private use, &c. Whereupon he was tried at bar and found guilty, for which he was fined 1000 marks and imprisoned at the King's pleasure, and to be of good behaviour for a year, and to make publick acknowledgment of his offence at the next assizes to be held for the county of Surry. Sid. 192. Pasch. 16 Car. 2. B. R. the King v. Sir Purbeck Temple.

3. 4 H. 7. cap. 12. s. 1. Enacted, that every justice of peace within the shire where he is justice, should cause to be proclaimed yearly, in four principal sessions, the tenor of the proclamation to the bill annexed; and every justice of peace present at any sessions, when it is not proclaimed should forfeit unto the King 20 s. — The which proclamation was to the effect following, viz. S. 2. Henricus Dei gratia, &c. the King [after a recital of the many mischiefs arising for want of putting the laws in execution] “ com-
 “ mandeth the justices of peace of this shire, to endeavour to exe-
 “ cute the tenor of their commission, and that every man that lets them
 “ to execute their authority, that they shew it to his grace, and if they
 “ do it not, and it comes to his knowledge by other, they shall be
 “ taken as men out of credence, and be put out of commission for ever.
 “ And over this he commandeth all men grieved in any thing that the
 “ justice of peace may determine, that they make complaint to the next
 “ justice of peace, or to any of his fellows; and having no remedy
 “ there, then to the justices of assizes if they are soon after to come into
 “ that shire, and if then they have no remedy, they shall come to the
 “ King or to his Chancellor; and his highness shall send for the said
 “ justices, to know the cause why his subjects be not eased, and his
 “ laws executed: whereupon if he find any of them in default, he
 “ shall do him to be put out of the commission, and punished accord-
 “ ing to his demerits, and his highness shall not let for any cause,
 “ but

"but that he shall see his laws to have true execution, and his subjects to live in surety."

The Court was moved to grant an attachment against a justice of peace for refusing upon complaint to come and view a force, but they denied the

same, and directed the party to bring an action of debt for the 100 l. forfeiture given by the statute in that case. Vent. 41. Mich. 21 Car. 2. B. R. Anon.

[18] 5. W. exhibited his bill against S. for a misdemeanor in his office of justice of peace, viz. for *compounding of matters* between the parties being bound over to the sessions, and now the Court observed this difference; that for *petty quarrels between party and party*, or for the peace, or petty trespasses, *where the King is not to have a fine*, there a justice of peace may make and persuade an agreement between the parties; but otherwise where a fine shall accrue to the King. Noy. 103. Whinnel v. Stroud.

6. Attachment against justice of peace for *refusing to sign a poor rate*. Sid. 377. Mich. 20 Car. 2. B. R. Inhabitants of Peterborough's Case.

7. A justice of peace is not *indictable* for not binding over offenders charged on oath with a riot. Cumb. 317. Hill. 6 W. 3. B. R. Aston's Case.

8. Holt declared, that if complaint was made to him, that some justice of peace had issued a *warrant to take goods* out of a man's possession *to which he pretended a right*, he would send for and bind the justice over; for people must take the legal remedy, as detinue, trover, or replevin. Farr. 99. Mich. 1 Annæ. B. R. Anon.

9. A dissenting teacher, having *qualified himself in one county*, removed into another, and set up a conventicle there, without further qualification; whereupon a justice of peace convicted him; an attachment was moved for against the justice for a *contempt of the Toleration Act*, alleging a qualification in one county to be so all over England. But per Cur. the Act of Conventicles is still in force, and the *justices of peace* have power to execute it against such as do not qualify according to the Toleration Act, so that they being judges of the matter, if they do wrong, the remedy is by *certiorari* or appeal to the sessions, where the whole may be re-examined, which shall be final by the very words of the statute; and if they err in a matter of which the law makes them judges, it would be most unreasonable to grant an attachment for such error. 6 Mod. 228. Mich. 3 Annæ. B. R. Peat's Case.

10. In-

10. *Information against* a justice of peace for sending one to the house of correction without sufficient cause. 8 Mod. 45. Pasch. 7 Geo. the King v. Okey.

11. A justice of peace *must take care that he hath such an information of the fact as may be sufficient to support his warrant of commitment*; but he need not set it forth in the warrant itself; for so much certainty is not required in warrants as in writs and pleadings, which are always on record. 8 Mod. 5. Mich. 7 Geo. the King v. Walter.

12. *Information against* justice of peace for *refusing his warrant* for a battery; but on shewing a reasonable cause the rule was discharged. 8 Mod. 337. Mich. 11 Geo. the King v. Nichols.

(M) Punishable by Action.

1. **I**F justice of peace *refuses to take the oath of the party robbed*, the question was, if the party may have an action on the *case* against him? Windham J. doubted, because justice of peace is a judge of record, and no action lies for what he does as judge; but per Periam and Anderson, it lies; for in this case he acts not as a judge but as a particular minister appointed by the 27 *El.* 13. to take the examination. Le. 323. Trin. 31 *Eliz.* C. B. Green v. Hundred of Bucclechurch.

Per Twifden J. if a thing be enacted by parliament to be done, the not doing whereof is a damage to one or 2 only, there

no indictment lies for the non-feasance; and upon this reason it is that the only remedy, in case a justice of peace refuses to take the oath of the party robbed, is for him to have an action on the case against him. Sid. 209. pl. 3. Trin. 16 Car. 2. Anon.

2. A justice of peace cannot detain a *person* suspected in prison, but during a convenient time only, to examine him, which the law intends to be three days, and within that time to take his examination, and send him to prison; and because here he *detained* him 18 *days* in his own house, the plaintiff brought an action of *false imprisonment*, and had judgment. Cro. E. 829, 830. Pasch. 43 *Eliz.* C. B. Scavage v. Tatcham.

(N) Pleadings in Indictment, or Actions against [19] them.

1. **W**HEN a justice of peace makes a justification, he need not shew his patent, any more than a sheriff shall shew the writ to him directed, or other records; per Choke, Needham, and Littleton: for per Choke the patent remains only with the *custos rotul.* Br. Monstrans, pl. 69. cites 9 E. 4. 2.

2. 7 *Jac.* 1. cap. 5. Enacts, that an action being brought against a justice of peace, mayor, &c. for any thing done by reason of their several offices, both they and all their assistants may plead the general issue, and yet give the special matter in evidence.

(O) *Determination* of their Authority. What is, and the Effect thereof.

If a new commission of the peace be proclaimed, or read in full county, the ancient

1. **WHERE** a new commission of the peace issues, and is *shown to some of the old justices*, yet the other justices who did not see it, are not bound to take notice, but may well sit by the ancient commission; per Paston; but Portington Serjeant, contra. Br. Commissions, pl. 2. cites 21 H. 6. 29.

commission of the peace is determined, and *all the justices ought to take notice thereof*; and if they sit after by the ancient commission, all that they do is void. Br. Commissions, pl. 6. (bis) cites Marrow's Readings.

A commission of the peace is made to four in the county of N. and after the

2. If one be justice of peace of a vill, and after the King makes another justice of peace of the same vill, yet the power of the first remains; because all is in affirmation; per Choke Justice, quod fuit negatum; for the second patent determines the power of the first. Br. Commissions, pl. 20. cites 10 E. 4. 7.

King makes J. S. justice of peace there, for term of his life, the first commission is determined. Br. Commissions, pl. 10. cites Marrow's Readings.

And where a man learned in the law is put in commission, and

3. Note for law, that where commission of the peace issues to J. N. and others, and after J. N. is made a knight, yet the commission remains for him. Br. Commissions, pl. 22. cites 35 & 36 H. 8.

after is made a serjeant of the law, yet he remains in authority by the same commission. Ibid. — And when a justice of the bank is made a knight, yet he remains justice, and his commission shall serve him. Ibid.

Br. Commissions, pl. 4. cites Marrow's Readings. Serjeant

4. 1 E. 6. cap. 7. s. 4. Enacts, that where a justice of peace is created a duke, archbishop, marquis, earl, viscount, baron, bishop, knight, justice of the one bench or the other, or serjeant at law, or sheriff, yet he shall remain justice.

Hawkins says, that it has been questioned, whether the dignity of baronet, which has been created since this statute, be within the equity of it. Hawk. Pl. C. 17. cap. 5. s. 5.

2 Hawk. Pl. C. 17. cap. 5. s. 7. —

* Such commission is neither revocable by the King, nor deter-

5. If the King grants to a * mayor and commonalty and their successors, to be justices of peace in their vill, and after makes commission of the peace to others there, yet the first commission shall remain in force; because it is granted to them and their successors, and so is not revocable at will as commission is. Br. Commissions, pl. 5. cites Marrow's Readings.

minable by his demise, as the common commission for the peace is, which is made of course by the Lord Chancellor according to his discretion. 2 Hawk. Pl. C. 37. cap. 8. s. 30.

[20] 6. If commission be directed to A. and B. who are not in rerum natura, or are dead at the time of the teste, &c. the ancient commission remains in force; for this new commission is void. Br. Commissions, pl. 6. (bis) cites Marrow's Readings.

7. If

7. If a *commission* be directed to *N. pro hac vice*, this shall determine the ancient commission of those matters, and yet *N.* the new commissioner cannot sit but *unica vice*. Br. Commissions, pl. 6. (bis) cites Marrow's Readings.

8. If a commission be directed to *hear and determine felonies*, this shall * determine the ancient commission of the peace *as to felonies*, but not *as to the peace*; and so determined in part, and in part not. Br. Commissions, pl. 7. cites Marrow's Readings.

* Serjeant Hawkins says, that this seems justly questionable, not

only as being contrary to common practice, but also because justices of peace, as such, seem to have authority by 34 E. 3. to hear and determine felonies, without any special clause in their commission for that purpose. 2 Hawk. Pl. C. 17. cap. 5. s. 7.

9. If *commission in eyre* is made to the county of *N.* and proclamation there, this shall determine the commission of the peace. Br. Commissions, pl. 8. cites Marrow's Readings.

But if commission of the peace be in the county of *N.* and

B. R. comes there, this shall not determine the commission of the peace; contrary if they make proclamation of the coming of *B. R.* Br. Commissions, pl. 9. cites Marrow's Readings.

10. 2 & 3 P. & M. 18. Enacts, that a new commission of the peace or gaol-delivery for the whole county, shall not be a supersedeas to a former like commission granted to a city or town-corporate, being no county.

11. If a new patent is made to justices of peace, in which one of the old justices is left out, yet the acts of the old justice are lawful till the next sessions, in which the new commission is published. And though the patent be of record, yet the party shall not take notice immediately, but at the sessions. Mo. 186, 187. pl. 333. Mich. 26 Eliz. in an Anon. Case cites 5 E. 4.

See more as to Justices of Peace in General, under the titles of Sessions, Quor, and other proper Titles in this Abridgment.

* Justices of Oyer and Terminer.

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(A) Justices of Oyer and Terminer. [*Their Power and Authority, and of what they may inquire.*]

* Concerning commissions of oyer and terminer, 10 conclusions are to be observed. 1. That oyers and terminers shall not

[1. †] If a man be indicted of barretry at an assises before the justices of oyer and terminer, and upon this process issues against him, returnable at the next assises, and the defendant, at the

be granted
but before
the justices
of the one
bench or the
other, or the
justices or-
eant, and
that for
greater hor-
rible wret-
chings; 2.
That com-
missions are

the next assises, *appears gratis, and pleads not guilty*, so that he is not in custody, so that he may be tried before the justices, as justices of gaol-delivery, ‡ yet he may be tried immediately at the same assises before them as justices of oyer and terminer. Hill. 9 Car. B. R. *Chapman's Case*; in writ of error upon such trial this was assigned for error, and per Curiam held good. (But it seems that it is very hard, and contrary to all the precedents, and it is greatly mischievous, if he shall not have time for his trial till the next assises, when he has not his witnesses ready.)]

like to the King's writs, such are to be allowed which have warrant of law, and continual allowance in Courts of justice. 3. That justices of oyer and terminer cannot proceed upon any indictment, but, upon [21] *indictments taken before themselves*; for their authority is, *ad inquirendum, audiendum & terminand'*. 4. That justices of oyer and terminer, may, upon an indictment found, proceed the same day against the party indicted. 5. That if any offence be prohibited by any statute, and name not in what Court it shall be punished; or if the statute appoint that it shall be punished in any Court of Record; in both these cases it may be heard and determined before justices of oyer and terminer. 6. That the King may make a commission of association, directed to others to join with the justices of oyer and terminer, and a writ of admittance to the justices of oyer and terminer, to admit the others into their society. 7. If the justices sit by force of their commission, and do not adjourn the commission, it is determined. 8. Justices of oyer and terminer, or justices of peace, cannot assign a coroner to an approver; for it is not within the commission of either of them; but justices of gaol-delivery may do it. 9. Justices of oyer and terminer shall send their records and process determined, and put in execution, to the Exchequer at Mich. every year, to be delivered there to the treasurer and chamberlains, &c. to keep them in the treasury. 10. None of these commissioners are countermanded by any new commission, unless the new commission be shewed unto them, or that it be proclaimed in the county; or that a new commission do sit and keep their sessions by force of the new commission. 2 Inst. 163, 164, 165. — S. P. But contra if they have commission of gaol-delivery also; quod nota; for both those may be executed simul & semel. Br. Commissions, pl. 24. cites 3 M. 1. — Br. N. C. pl. 474. S. C. — S. C. cited 12 Rep. 32. — S. P. Sti. 29 Trin. 23 Car. in Case of the King v. Place.

It is generally said, that justices of oyer and terminer have no power by virtue of a general commission to proceed against any persons, but those who are indicted before themselves; because the words of it are, that they shall inquire, hear, and determine, by which it seems to be implied, that they must inquire of an offence, before they proceed to hear and determine it. But this reasoning depending wholly on the wording of general commissions, which are made in such form, doth by no means prove that a special commission of oyer and terminer, reciting an indictment of a particular person, and authorising the justices to send for and proceed upon it to try the offender, is not good; and accordingly we find, that the attainder of DUDLEY, afterwards EARL OF LEICESTER, by virtue of such a commission was not objected against on this account in the arguments concerning it, reported in Plowden's Commentaries. 2 Hawk. Pl. C. 21. cap. 5. §. 31. — Cro. C. 340. S. C. — ‡ It seems certain at this day, that the same persons being authorised by both the commission of oyer and terminer, and also of gaol-delivery, may proceed by virtue of the one in those cases, wherein they have no jurisdiction by the other, and execute both at the same time, and make up their records accordingly; but this doth not seem to have been clearly agreed in former times. 2 Hawk. Pl. C. 20. cap. 5. §. 20.

9 Rep. 118.
b. H. P. C.
165.

2. Justices of peace by force of their commission of oyer and terminer cannot take an indictment of forgery upon the statute of which gives power to justices of oyer and terminer to take it; for justices of oyer and terminer, intended by the statute, are justices of assise or other justices who have a special commission of oyer and terminer, per excellentiam, and not justices of peace who have a general commission. M. 9 Car. B. R. *Smith's Case*, who was indicted before justices of the peace in London, and also at Newgate of forgery, and the indictments quashed per Curiam.

3. If

3. If there be a *falo de se*, and no inquisition taken thereof by the coroner upon view of the body, because the body cannot be seen, being * cast into the sea, or otherwise absconded, an indictment of it may be taken before the justices of peace and oyer and terminer, at their session. M. 15 Car. B. R. *Newman's Case*, where such indictment was found by direction of the Court, and after a plea pleaded for the goods, and a verdict given for the King. 5 Cooke. 110. *Foxley's Case*. * Orig. (and iect)

4. If a man is disseised sitting on oyer, he may have assise there, without writ out of Chancery; and shall have attaint there, upon false verdict given there, in the same manner without writ of the Chancery, and needs no patent of assise there; for the commission of oyer shall serve for it; but see always that the commission shall be special; for it seems that all commissions in oyer are not alike. Br. Oyer and Determiner, pl. 9. cites 6 E. 2.

5. If the lord of a leet offends of hue and cry within his own proper precinct, or the like, which is punishable by leet, this shall be presented in oyer; for he cannot be punished in his own leet; per Wilby. Br. Oyer and Determiner, pl. 3. cites 21 E. 3. 3. Br. Leet, pl. 13. cites 21 E. 3. 3 & 4.

6. Commission issued to Knivet, Thorp, and Ludlow, knights, to hear and determine all manner of treasons, felonies, conspiracies, champerties, ambodextries and damages, grievances, extortions and deceipts done to the King and to the people, as well at the suit of the King as of the party, and also of wards, marriages, escheats and other things due to the King in the counties of Essex, Hertford, Cambridge, Suffolk and Norfolk; by which they came to Chelmesford such a day, and caused to read their commission, and after caused the bailiffs of every hundred to be called one by one, as well in the franchise as out, and commanded them to return their pannels, and charge inquests upon the points above, according to the manner of the said sessions, and would not allow charters of exemption, because they had not this clause, *licet tangat nos & heredes nostros*, and those matters touched the King, and when some were indicted they were compelled to answer it immediately, and some bailiffs were indicted of extortion and some of felony, and they were compelled to deliver over their bailiffs rods to their under-bailiffs, and were commanded to prison without bail. Br. Oyer and Determiner, pl. 6. cites 42 Ass. 5. Br. Commissions, pl. 15. cites S. C.—F. N. B. 112. (D) that such commission is good.

[22]

7. The writ of oyer and terminer should not be properly called a writ, but it is a commission directed unto certain persons, when a great assembly, insurrection, or a heinous misdemeanor or trespass is committed and done in any place. Then the manner and usage is to make such a commission of oyer and terminer, to hear and determine such misbehaviour. F. N. B. 110. (B). At this day the common form of a general commission of oyer and terminer, is to authorize the persons

to whom it is directed, or three or four of them, of which number either such or such particular persons among them are specially appointed to be, to inquire by the oaths of lawful men, and by other means, of all treasons, felonies and misdemeanors, being specially mentioned, and of all others, in such and such counties, and to hear and determine the same at certain days and places, to be appointed by them, &c. for which purpose the King acquaints them, that he hath sent a writ to the sheriffs of such counties, commanding them to return a jury before them, at such days and places as shall be notified

notified by them, in order to make inquiries of such offences, &c. 2 Hawk. Pl. C. 27. cap. 5. s. 21.—It is observable, that the abovementioned commission *makes no mention of the suit of the party*; but it seems to have been anciently the most common form of such commission, to direct the justices to hear and determine offences, as well at the suit of the party as of the King. 2 Hawk. Pl. C. 20. cap. 5. s. 22.

8. Oyer and terminer was granted *for a ward ravished, and goods taken*, and the defendant found guilty, and thereupon a sci. fa. issued. F. N. B. 110. (C) in notis (a) cites 29 E. 3. 37.

9. So *upon a rescous made upon the King's bailiff*, where he had distrained for debts or amercements to the King. F. N. B. 112. (A)

10. And if a man have goods, and merchandise in any ship upon the seas, which ship is broken by tempest, and the goods cast upon the lands, which are *no wrecks*, because certain persons came alive to the land, and the merchandises, or goods, are *taken by malefactors unknown*, &c. the party may have a commission of oyer and terminer, directed unto certain persons, to enquire of those who did the trespasss, and to hear and determine the same, and to make restitution unto the party, and a writ unto the sheriff, to return probos & legales homines, &c. before the said justices, &c. F. N. B. 112. (C)

11. If a man sueth a commission of oyer and terminer against divers persons for *taking of his goods and chattels, and wasting, spending, or eloigning them*, the party shall have a writ unto the sheriff, reciting the matter, commanding him to stay the goods, and to put them into safe custody, until it be otherwise provided and adjudged by the justices of oyer and terminer, &c. If it be found for the plaintiff, the justices may *return the goods to the party, and give him damages*. F. N. B. 112. (F)

And so of
the arch-
bishoprick,
if any per-
son hunt in
the parks, or
cut down

12. In the time of the *vacation of a bishoprick*, if any person hunts *in the parks and chases* of the bishop, the King may send his commission of oyer and terminer to certain persons, to hear and determine, and enquire thereof. F. N. B. 112. (G)

the woods, or fish in the piscaries of the bishop, &c. when the archbishop is created, the King may send and grant the commission of oyer and terminer, to enquire and determine the trespasss in the time of the vacancy. F. N. B. 112. (H)

[23] 13. If the *sea walls be broken, or the sewers or gutters not scoured*, so as the fresh waters cannot have their courses, the King ought to grant a commission to enquire thereof, and to hear and determine the defaults. F. N. B. 113. (A)

14. If certain persons ought to *account unto a corporation*, as if the King grant to the honest men of the town of N. a certain sum, out of things which come to the same town to be sold, and there are collectors to gather the same, who do so; the King may grant a *commission to certain persons to enquire what persons have received such sums*, and to hear and determine the matter, and to hear their accounts thereupon, and do in that case as auditors shall do; and he shall send a writ unto the sheriff to return a jury before

before the same justices at the day, &c. which they appoint, &c. to enquire thereof. F. N. B. 114. (C)

15. *All offences expressed in any statute may be inquired by the justices of oyer and terminer, notwithstanding that the statute does not give power to any to enquire of them by express words; per Justiciarios. Dal. 24. pl. 4. 4 & 5 Ph. & M.*

16. *In term time, no commissioners of oyer and terminer, or gaol-delivery, by the common law, may sit in the same county where the K. B. sits; for in presentia majoris cessat potestas minoris. 9 Rep. 118. b. Trin. 10 Jac.*

(B) Constituted How; and Power determined.

1. Stat. Westm. 2. **T**H E writ of trespass to hear and determine 13 Edw. 1. cap. 29. *shall not be granted before any justices, except the justices of either bench, and justices in eyre, unless for a great trespass, where hasty remedy is required; neither shall be granted a writ to hear and determine appeals before justices assigned, but in special case, and when the King shall command; and lest the party should be kept too long in prison, such appellees and indicted may have a writ of odio & atia, as in Magna Charta. Confirmed 2 Edw. 3. cap. 2.*

2. 33 E. 1. the Statute of Ragman. *By this act it was ordained, that justices should go through England, to hear and determine trespasss, and other complaints of things done within twenty-five years before. And see divers matters in that statute concerning those things.*

3. *Upon the death of justices of oyer and terminer after an indictment taken before them and process awarded thereupon, the King may grant a new commission to others commanding them to proceed upon such process and to hear and determine the same, and the King shall send a writ to the executors of the justices who are dead to send the records before the new commissioners, &c. 2 Hawk. Pl. C. cap. 5. s. 16.*

4. 2 E. 3. 2. *Commissions of oyer and terminer shall not be granted, but before one of the justices of the one bench, or the other, or the justices errant, and that for great hurt and horrible trespassses, and of the King's special grace, according to the statute of Westminster, 2. 29.*

5. *Oyer and terminer; writ was sent forth at the suit of W. P. and he disavowed it, and the disavowment accepted. Br. Oyer and Determiner, pl. 4. cites 12 Aff. 21.*

But in replevin disavowment of the suit was not received,

and supersedeas was issued out; quod nota. For it is not an enormous trespass, therefore quod supersedeant, and after a writ under the Targe of later date was issued forth, commanding them that they proceed according to law notwithstanding any command, by which they proceeded by advice of all the justices, and yet their commission of this before was in a manner repealed. Br. Oyer and Determiner, pl. 4. cites Mich. 13 E. 3.—* Orig. (South le Targe.)*

6. *In assise the defendant pleaded recovery in oyer and terminer of [24] certain damages in trespasss before certain commissioners such a day, by which*

which he had *elegit*, and this land put in execution as a moiety, &c. and that the monies are not yet levied, judgment if assise; the plaintiff said that after this commission, and before the judgment given, another commission issued to restrain the first commission, because it was too large, judgment; and prayed the assise; Fish said, And we pray judgment, because he does not allege that the first commissioners before judgment had notice of the second commission; and he said, if commission be granted to me, and I use it, if commission be granted to you of later date, and you do not use it, nor any notice comes to me neither by user nor by writ, there the first commission has not lost its force; but when the last commission is used, it shall be of force from the date to some regard; but yet the judgments, which are given by the first commissioners, who had not notice of the last commission, which is not put in ure by the holding of sessions, shall be good, and shall be executed, notwithstanding such last commission; and the opinion of the justices was with Fish in omnibus; quod nota; Percy ad idem, if the first commissioners had arraigned felons, who were indicted and found guilty, and judgment given that they should be hanged, this judgment shall be executed, if the last commission be not put in ure nor notice of it to the people before the judgment; and so it appears there, that if notice be after judgment, yet the judgment shall be executed; and the opinion of the Court was clearly against the plaintiff; quod nota. And per Fish the first commission shall not cease till they have notice, or that the country may have notice. Br. Commissions, pl. 13. cites 34 Aff. 8.

7. Stat. 33 Hen. 8. cap. 23. §. 1. *If any persons, being examined by the King's council, or three of them, be vehemently suspected of treason, misprision of treason or murder. By the King's command, his Majesty's commission of oyer and terminer under his great seal, shall be made to such persons, and into such shires, as shall be appointed by the King.*

* See F. N. B. 114. (A)

(C) *How to execute the Commission, and of * Proceeding before them.*

1. **N**OTE the Court adjourned all indictments till in *crastino*, notwithstanding that it was said, that they could not make adjournment before they knew that they have commission; for per Cur. it is not properly an adjournment, but a surcease, to be advised; and after the defendant justified for estovers, judgment si actio; and the issue was, that he came by force, absque hoc, that he had estovers there, &c. and so to try the right, and so the issue * [was taken all in the realty.] Br. Oyer and Determiner, pl. 4. cites 12 Aff. 21.

* 12 Aff. 21. Orig. [et per tant.]

2. Where *supersedeas* comes to the justices of oyer and terminer, by which their commission is in a manner repealed, yet by *procedendo* after, they may proceed, and this by advice of all the justices. Br. Commissions, pl. 12. cites 12 Aff. 21.

3. Justices

3. Justices of oyer and terminer, where the parties plead to the country on Tuesday, shall take the inquest the Wednesday next; quod nota. Br. Oyer and Determiner, pl. 5. cites 29 Aff. 33. Br. Error, pl. 124. cites S. C.

(D) Their Proceedings returned into other Courts. [25]

1. [T was presented before the justices of oyer and terminer in the county of S. that the prior of S. ought to repair the bridge of S. and the commissioners came into B. R. and process made there against the prior; and so see that a thing done in oyer shall come into B. R. and process shall be made there. Br. Oyer and Determiner, pl. 1. cites 44 E. 3. 31.

2. Oyer and terminer in the county of L. was made to come into Chancery, scilicet the commission and the presentments, and were sent into B. R. and process made there. Br. Oyer and Determiner, pl. 2. cites 44 E. 3. 43. And so it seems that certiorari shall issue to the commissioners

after the oyer and terminer determined, and then shall be sent into B. R. by mittimus. Br. Oyer and Determiner, pl. 2. cites 44 E. 3. 23. and H. 1. E. 6. accordingly.

3. Indictments and records, which are taken before justices of oyer and terminer and not determined before their commission be ended, shall be sent into B. R. to arraign the parties there. Br. Corone, pl. 178. cites 1 E. 6. S. P. Br. Oyer and Determiner, pl. 1. cites 38 H. 8. — 2 Inst. 419. S. P.

Justices of Gaol-delivery.

(A) Justices of Gaol-delivery. [And the Difference between them and Justices of Oyer and Terminer.]

[1. [F an indictment of murder be taken before the justices of peace of Middlesex at Hise's Hall, against two persons A. and B. and after the indictment is delivered over by the justices of the peace according to the statute of E. 3. to the justices of gaol-delivery at the justice hall, and there A. appears and is tried, but B. does not appear, upon this the justices of

of the gaol-delivery cannot *award process against B.* returnable before the justices of the peace, and the justices of the peace after *award process of outlawry* against him; for the indictment is before the justices of gaol-delivery and not before the justices of the peace, and therefore the justices of the peace cannot award process upon the indictment which is not before them; for if he had appeared before them, they could not try him, and the justices of the gaol-delivery cannot grant process returnable before other justices. Trin. 11 Car. B. R. *Storie's Case*, who was outlawed and reversed it for this cause.]

Fol. 97.

[26]

[2. If an indictment be taken as before was in *Storie's Case* against A. and B. and the indictment delivered over according to the statute to the justices of gaol-delivery at the justice hall, and there A. is tried; it seems that *the justices*, by force of the statute, *may award process against B. upon the indictment* which is before them *returnable before themselves at the next gaol-delivery*, though it be held by force of a new commission, and though the statute gives to them power only to try prisoners, and not to proceed against any who is out of prison; for otherwise there shall be a failure of justice, for it cannot be delivered again to the justices of peace, there being a record made by the trial of A. that it was delivered to the justices of gaol-delivery. Tr. 11 Car. B. R. in the said *Case of Story*; this was doubted per Curiam; but they said that the clear way was to remove it into B. R. and there to proceed; and some of them thought that the justices of gaol-delivery might in this case award process, as before is said, as well as the next gaol-delivery may award execution of a prisoner adjudged in the last gaol-delivery, as the use is.]

3. Justices of gaol-delivery *may make writ of restitution to the plaintiff* in appeal before them, when the defendant is convicted before them, *bearing teste at the place of the gaol-delivery*. Br. Judges, pl. 26. cites 4 E. 4. 11.

4. If commission of gaol-delivery be *directed to A. and B.* and after *another commission is directed to C. and D.* and before notice of the second commission, as where it is not shewn to them, *the first justices sit, and take assise, and deliver the gaol*, this is well done. Br. Commissions, pl. 2. cites 21 H. 6. 29. per Newton Ch. J.

5. If *commission* be made to justices of gaol-delivery, *to deliver the gaol hac vice*, yet *they may adjourn*, and may deliver the gaol at the day of adjournment, notwithstanding these words (*hac vice*.) Br. Commissions, pl. 18. cites L. 5 E. 4. 32.

And justices of gaol-delivery and of oyer and terminer may inquire in

6. Justices of gaol-delivery *have power as justice of peace*, and if they make their record as justices of gaol-delivery, the other power is void; per Brudnel and Keble J. Br. Commissions, pl. 17. cites 9 H. 7. 9.

both powers all at one time, and make their record as justices, in the one form, and the other, all at one time, and well; per Butler, Hobert, Bead, Wood and Fisher. Ibid.

7. If

7. If justices sit by commission, and do not adjourn it, the commission is determined. Br. Commissions, pl. 11.

8. Indictments taken before justices of gaol-delivery, and not determined, shall be delivered to the clerk of the peace of the county where, &c. and when other justices of gaol-delivery come there, they may proceed upon them; contra of the indictments of oyer and terminer, and see now the statute thereof. 1 E. 6. c. 7. Br. Corone, pl. 178. cites 1 E. 6.

9. Note, by coming of commission of oyer and terminer, the commission of gaol-delivery is not determined; for the one stands with the other; contrary where the one commission is contrary to the other; as of commission of the peace, where there is a former commission thereof to others; this is contrariant that each of them should be commissioners of one and the same thing, and both in force; and the commission of gaol-delivery is only to deliver the gaol. Commission of oyer and terminer has the words *ad inquirendum audiend. & determinand.* Note the diversity between them; but more commonly the justices of gaol-delivery are also in the commission of the peace, and by this they indict, and after deliver the gaol as well of those as of the others. Br. Commissions, pl. 24. cites 3 M. 1.

Br. N. C. pl. 474. S. C.—S. C. cited 12 Rep. 32.

10. Justices of gaol-delivery have power to assign a coroner to an approver. 4 Inst. 165. Standf. Pl. C. 143. b. cap. 55.

11. Upon the authority given them by their commission and by statutes, 13 conclusions follow. 1. They may arraign any one in prison in that gaol, upon an indictment of felony, trespass, &c. before justices of peace, though not found before * themselves, which justices of oyer and terminer cannot do; and justices of peace shall deliver their indictments to the justices of gaol-delivery.—2. They shall take a panel of a jury returned by the sheriff without making any precept to him as justices of oyer and terminer must do; because a general commandment is made to the sheriff by the justices of gaol-delivery to return juries against their coming; but if they have a special commission it is otherwise; per Hankford.—3. They may deliver suspects for felony, &c. by proclamation, against whom sufficient evidence is not produced to the grand inquest to indict them, &c. which justices of oyer and terminer, or justices of peace cannot do.—4. † They may inquire and take indictments of felony, &c. of prisoners before them and proceed upon them, and so may justices of oyer and terminer; for both of them have authority to inquire, hear, and determine of such as are prisoners in the gaol.—5. They may award execution against a prisoner who was indicted before justices of peace, and outlawed thereupon, and afterwards taken and committed to prison.—6. They may assign a coroner to an approver, and make process against an appellee in a foreign country.—7. They may punish those that let men to bail, or mainprise, not bailable by law, or suffer them to escape.—8. By the judgment of the whole parliament in the statute of 1 E. 6. 7. it follows, that according to the generality of the words of their commission they may deliver the gaol of prisoners

* Note, justices of oyer and terminer cannot by this authority inquire but of such who are indicted before themselves; for their commission is *ad inquirendum audiendum & terminandum*; but justices

[27] of gaol-delivery may arraign a prisoner indicted before others: the words of their commission are *ad gaolas, gaolam de B. de prisonariis in ea existentibus hoc vice deliberand.*

*Arundell
leges, &c.
Brook, title
Commission,
3 Mar. 24.
4 Ed. 3.
c. 2. That
justices of
gaol-deliv-
ery may
deliver pri-
soners in-
dicted be-
fore the
guardians of
the peace.
12 Rep. 32.
—S. P. Sti.
29. in Case
of the King
v. Place.—*

mitted for high-treason.—9. They shall send their records and process determined, and put in execution to the Exchequer at Michaelmas, to be delivered there to the treasurer and chamberlains, &c. to keep them in the treasury.—10. They may receive appeals of robbery and murder by bill, but the appellees must be in prison before them.—11. Commissions of association, and writs of admittance, & si non omnes are directed as has been said of justices of oyer and terminer.—12. They shall keep their sessions in the principal and chief towns of the counties where the Shire-Courts of the same counties are holden.—13. By statute of 2 & 3 P. & M. cap. 18. it is provided that all commissions of the peace or gaol-delivery to any city or town corporate, not being a county of itself, shall stand and remain, the granting of any like commission of the peace, or gaol-delivery, in any shire, lathe, rape, riding, or wapentake, being of a later date, to the contrary notwithstanding. 4 Inst. 168, 169. cap. 30.

Judgment was given against J. S. upon an indictment of barratry in the county palatine of Lancaster, taken before the justices of peace and removed before the justices *ad placita tenend.* by certiorari; and hereupon a writ of error brought, which recited a conviction before A. and B. justices of oyer and gaol-delivery, *nec non ad alia*, &c. which was held to be an ill writ, and the record not removed; because justices of gaol-delivery and oyer and terminer cannot hold plea but of indictments taken before themselves, and cannot send mandatory writs; but the justices *ad placita tenend.* *infra comitat. palat. Lancast.* may; and so they did, so that the record was before them in that capacity, which the writ of error mentioned, and not therefore ill. Skin. 32. Hill. 33 & 34 Car. 2. B. R. the King v. Leaver.

† H. was indicted before the justices of assize, for inclosing land, &c. Exception was taken, that the *teste* of the indictment was at a gaol-delivery before R. S. and P. G. and other justices of peace of the Queen, &c. in the said county; and for this cause it was alleged to be void; for that at a gaol-delivery they have no authority to take such indictments, and this was held a material exception; but the justices said, they would advise, &c. Cro. E. 90. Hill. 30. Eliz. B. R. Willoughby's Case.—So an indictment of felony which was taken and found before the justices of gaol-delivery in the county of Somerset, and upon which the defendant was outlawed, was discharged upon exception taken, that they have no authority to take indictments, unless they are justices of peace, and cited 3 Mar. Br. Commissions, pl. 24. Cro. E. 179. Pasch. 32 Eliz. B. R. Purcell's Case.—2 Hawk. Pl. C. 24. cap. 6. s. 3. cites S. C. But says, that the common opinion, that they have such power, seems much more agreeable to reason; for surely it cannot but be implied in their commission to deliver prisons of their prisoners, that they must have authority to make such deliverance by due course of law, which cannot be without a proclamation, if there be no prosecution, or a proper trial, if there be one; in order to which there must be an accusation of record, without which the prisoner cannot be arraigned or tried.

When com-
mission of
oyer and
terminer is
determined
the * re-
cords of it
shall be sent
into B. R.
but records
of the jus-
tices of gaol-

12. 1 E. 6. cap. 7. s. 5. *Where any persons shall be found guilty of treason or felony, for which judgment of death may ensue, and shall be reprieved to prison without judgment at that time, those persons who shall, at any time after, be assigned justices to deliver the gaol, where such persons shall remain, shall have authority to give judgment of death against such persons, as the same justices before whom they were found guilty might have done, if their commission of gaol-delivery had continued.*

delivery shall remain with the custos rotulorum of the county, and the next justices of gaol-delivery shall proceed upon them, upon judgment of the death by this statute; Brooke makes a quære, if they shall proceed by the words of this statute to allow clergy or sanctuary, &c. and says it seems they shall by the equity. Br. Commissions, pl. 11.—S. P. 12 Rep. 32. cites Brooke, tit. Commissions, 12. and 38 H. 8.—* S. P. and therefore, and because convictions before justices of gaol-delivery only are mentioned, this statute extends not to conviction before justices of oyer and terminer. 2 Hawk. Pl. C. 27. chap. 6. s. 17.—A person was condemned for felony, and ordered for execution, which is respited by the sheriff, and afterwards, before new commissioners pleads, general pardon

pardon of all felonies and executions; they cannot allow it, but the record of his * arraignment and the indictment shall be removed by certiorari before the justices of B. R. with the body of the prisoner by corpus cum causa, and it shall be allowed there, and not elsewhere; for the power of the first justices is determined, and the second justices are not to view the record, or bring the prisoner before them, judgment having been given; *otherwise if judgment had not been given*; for in such they might do as the first justices might have done, and this by statute 1 E. 6. 7. but not before. Dal. 20. pl. 9. 2 & 3 P. & M. Anon.——S. P. but left a quære. D. 165. pl. 4. Mich. 1 Eliz. Anon.——But before this act, if one had been indicted and convicted by verdict or confession before any commissioners, and *before judgment the King had died*, no judgment could have been given; the King, for whom judgment should be given, being dead, and the authority of the justices determined, which special cases are remedied by this act. 7 Rep. 31. b. Trin. 1 Jac. in the Case of discontinuance of process &c. by death of the Queen ——S. P. in case of treason or felony. Cro. J. 14. Pasch. 1 Jac. pl. 18.——a Hawk. Pl. C. 27. cap. 6. s. 18.

8. 6. *No process or suit before justices of assize, gaol-delivery, oyer and terminer, or peace, or other of the King's commissioners, shall be discontinued by a new commission, or by the alterations of any of their names.*

13. *If a thief be condemned to be hanged, and the justices command the sheriff to respite the execution for 6 weeks, they may within the 6 weeks, and after the sessions adjourned, respite for a longer time; per all the justices, and the custom of the realm has always been so.* D. 205. 2. pl. 5. Mich. 3 & 4 Eliz. Anon.

14. *It being doubted, whether persons in Newgate for treason might be indicted and tried before the justices of gaol-delivery without a commission of oyer and terminer, the Master of the Rolls, late Attorney-General, affirmed that the same question was moved 11 Eliz. to all the judges, who held that they could not proceed against such persons without commission of oyer and terminer, whereupon it was thought the surest way to have a commission of oyer and terminer of all treasons &c.* And. 111. pl. 156.

But the reporter makes a quære of the law in those cases; because some hold that justices of gaol-delivery may enquire &c. of treasons as well

as justices of oyer &c. but their authorities some how differ; for the latter gives power to *inquire &c. of all treasons in such a county*, but the former gives authority to deliver the gaol, as Newgate &c. *of all prisoners whatsoever in the said gaol being*; so that by the one, the justices may inquire of all treasons &c. done in the county, but by the other, they cannot intermeddle with other offences committed by the prisoners in the gaol [than such as are] mentioned in the commission; and, as some say, of such prisoners as are in the gaol at the time of the commission awarded; but the reporter thinks otherwise; because the practice in some places has been otherwise. And it was said that the justices of gaol-delivery have no *authority to inquire and take indictments*, for the want of such words in their commission; to which it was answered, that they may inquire, hear, and determine the offence of the prisoners in the gaol; for otherwise their commission, by the common law, was vain, which gave authority to deliver the gaol, which deliverance ought to be according to the course of the common law, and therefore ought to be by indictment and other circumstances necessary by the law to make lawful deliverance; so that the indictment for the lawful deliverance of the offender is so incident, that it cannot be served, if the deliverance be made upon the trial; for without it he cannot be delivered; and likewise the commission gives power as well to indict as to try and make deliverance thereupon; for the indictment is implied in the words of deliverance. And though the practice now is to indict before justices of peace for felonies and such offences as they may intermeddle with, and afterwards to try those so indicted before the justices of gaol-delivery, yet this proves not the necessity of doing so, as Br. tit. * Commission seems to hint. For this is not allowed by the common law of the land, there being no justices of peace by the common law who could take indictments, but this is warranted by the statute of 4 E. 3. 2. which gives authority to justices of gaol-delivery to deliver gaols of those who are indicted before the keepers of the peace; so that such proceeding does not prove that the justices of gaol-delivery cannot inquire. Now if they inquire, then the question is, if they shall inquire, hear, and determine treasons committed by prisoners in the gaol, or not? And to this it was said, that they may; for *their commission is general*, and the generality of the words contain under them, as well matters of treason as other offences; and since the words give authority, there is no reason to reduce them to a special sense, they having in themselves a general one, especially when it is for execution of justice, and they carry such meaning; which shews that treason is not excepted; for the words (of all prisoners whatsoever in the said gaol being) implies that they shall have power to

Deliver all, whatever their offence be, out of prison; and this differs from the case of justices of peace, who have neither special nor general words to authorise them, but is to be compared to the cases of other justices, who by general words have authority to meddle with treason as those of B. R. who intermeddle with treasons, and that †, so shall the commissioners of gaol-delivery; and this was held for law by the parliament in time of E. 6. in the first year of whose reign cap. 7. it was ordained among other things, *that if any person be found guilty of treason &c.* Whence it plainly appears that they took the law to be, that the justices of gaol-delivery might hear and determine the treasons committed by the prisoners, and if so, it follows of consequence, that they may take indictments also before themselves, of the same offence, and do all other things necessary to make lawful delivery of the prisoners of all kinds out of the gaol, whether by execution of, or by discharging them. And. 111, 112, 113. 26 Eliz. pl. 156. Anon.——* Quære if he means pl. 24.——† S. P. 2 Hawk. Pl. C. 24. cap. 6. s. 4. says, that this is not only warranted by very great authorities, but also it seems more agreeable to reason; for since the words of the commission are general, and include [29] all prisoners alike without any exception, why should those who are accused of treason be construed to be out of the meaning of them more than others? especially considering, that the greater the crime is for which a man is imprisoned, the greater hardship it is for him to lie under the terror of a prosecution for it, without being admitted to an opportunity of clearing his innocence.

15. By 33 H. 8. 20. They may punish such as keep unlawful gaming houses, or use unlawful games. By 5 Eliz. 3. par. 9. they have jurisdiction over perjury and subornation of perjury against the form of that statute. By 8 Eliz. 3. they may punish those who transport sheep alive. By 23 Eliz. 1. par. 9. they may inquire of, hear and determine offences against that statute in not coming to church; and generally they have the like power in other statutes, creating new offences, which it would be too tedious particularly to set down in this place. 2 Hawk. Pl. C. 27. cap. 6. s. 19.

* There is no letter in Roll.——

* (A) † Justices Itinerants.

† They were originally instituted for the good rule of the subjects and ease

[1. JUSTICES Itinerants were first ordained † by H. 2. who divided the realm into six circuits, and appointed 3 justices for every circuit. Speed. 467. Janus Anglorum. 108.]
of the countries, and that such as had franchises might claim them; they were called justiciarii in itinere, or itinerants, in respect of other justices that were residents. In the Black Book in the Exchequer, cap. 8. they are called justiciarii deambulantes and perlustrantes; their authority was by the King's writ in nature of a commission, they had jurisdiction of all pleas of the crown, and of actions, real, personal and mixt; they rode from 7 years to 7 years; in what country soever they came, all other Courts, during the eyre, ceased, and all those pleas in that county, or arising there before any other, the justices in eyre might proceed upon as the others might have done. 4 Inst. 184. cap. 33.——But as the power of justices of assizes, by many acts of parliament, and other commissions, increased, so these of justices itinerantis by little and little vanished away. Co. Lit. 293. b.

‡ 22 H. 2. being Anno 1176. and that it was done communi omnium consilio. Prynne's Animadversions on 4 Inst. 150. cap. 33.——And Sir Henry Spelman in his Glossary verbo Iter, accordingly, and says that there were 2 sorts of justices itinerant, alii comitatus itinerabant; alii forester comitatus itinerantes nova aucti autoritate sub Edouardo 3. hoc exuerunt nomen & justitiiarii assisarum sunt exinde nuncupati. Qui forestis designantur, hodie priscam retinent appellationem, alter forestis Cistrentanis aliter Ultra-trentanis constitutus.

[2. Hery de Braibrock a justice itinerant being surprized in time of H. 3. by Falcasius and imprisoned, because 30 verdicts had passed

passed against him; by assent of parliament the King went in person with the clergy and laity to the siege of the place, and delivered him accordingly. Speed. 513.]

3. They were to *inquire of escheats, lands, churches and women in the King's gift, and of castle-guard, who? How much? And where?* So as they had the work of escheators, and made their circuits serve as well for the King's profit as justice to his subjects; they used to *take fealty* of the people to the King at one certain time of the year *and to demand homage* also. Bac. of Government, 1st Part, 199. cap. 62.

4. Before every expedition they went about to the several tenants in ancient demesne, and to the King's borough-holders in every county within their district, and there they *demand an aid, which was in the nature of a gift, or auxilium towards the King's expedition*, and if they could not then give, the King, at the end of the expedition, might tallage to a tenth; and after tallaging of the metropolis the justices in eyre went through their proper circuits and tallaged all the King's tenants in ancient demesne, and burgage tenants; and when any aid was given, or the justices assessed any tallage, they returned the same out of their several iters to the justitarii residentes in the Exchequer. G. Hist. View of the Exchequer 28, 29.

* (B) Justices Itinerants and others [*punished.*]

[30]
* This in
Roll is Letter (A)

[1.] IN time of H. 3. Sir Henry de Bath, in a circuit, *appropriated to him 200 l. land*, for which he was impeached. Speed 530.]

[2. E. 1. Deposed diverse justices, and fined them for *bribery*, Speed 545.]

A justice of
record may
be indicted

of taking of money, and other such falsity; but not of that which goes in falsifying a record, as to say that he altered the record from trespass to felony, and the like, which falsifies the record. Br. Indictment, pl. 58. cites 2 R. 2. 9.—And where a justice of oyer and terminer was arraigned of such offence, he demurred upon the indictment, and the justices held the indictment void; for it goes in defeasance of the first record; quod nota. Br. Indictment, pl. 14. cites 27 Aff. 18.

Mr. Selden, in his notes on Eadmer, gives us the laws and customs which William the King granted to all the people of England after his subduing the land, and which are said to be the same as King Edward his kinsman observed before him; the 15th whereof is, *qui falsum tulerit judicium veram suam perdat nisi talis sacrosanctis (evangeliiis) probare poterit se melius judicare non potuisse.* And there 86. No. 41. De Judiciis, beginning about 14th line, it is, *fil ne pot aleier, quod plus recti facere nel sont si perde la franchises si al rei nel pot racheter a son plaisir. Et si fit in Danorum lege sit forisfactura de LANSLITZ, fil alaier ne se pot quod melius scire non selt, & quod rectam legem & rectum judicium recusaveris, sit forisfactura erga illum, cui jus hoc pertinuerit; si sit erga regem VI. libra, si sit erga comitem XL. solidi, si sit in hundredo XXX. solidi, et erga omnes i cons qui Curiam habent in Anglia coeit ad solidos Anglicanos. In Danorum lege qui rectum judicium recusaverit, sit is in misericordia de suo LANSLITZ, nec bene faciat querelam Regi de hoc quod quis ei deficerit in hundredo aut in comitatu.*—What is in the Roman character is left by Mr. Selden untranslated, which (as my time is not so advantageously employed, as that great man's was, so much to the benefit of the learned part of mankind) I will essay the turning into English, and if the reader likes it, he may content himself with it, but if, not, he may amend it, and if a mistaken guess should contribute to the making a right one, it would give me some satisfaction. I shall English the first part of it thus, viz. If he cannot allege or make his law, that he knew not to do more right, so as he lose his franchise to the King, he shall not redeem it at his pleasure. And so in the Dane-law it is a forfeiture of LANSLITZ, if he cannot make his law or swear that he knew not how to do better &c.

* Fleta, 19.
cap. 17.
f. 19.

3. Sir William Thorpe, who had been Ch. J. of B. R. was indicted, for that he *cepit munera contra juramentum suum*, viz. of R. S. 10 l. of H. 20 l. of D. 40 l. &c. And King E. 3. appointed three earls and two lords to examine this matter; and he being charged with it could not deny it. The judgment was, that he *malitiose falso & rebelliter having broke his oath &c.* be hanged; which Ld. Coke calls a strange judgment, and takes notice that there was neither felonice nor proditorie in the said judgment. See 3 Inst. 145. cap. 68. and 223. cap. 101. and page 224. he says it appears by Fleta, lib. 1. cap. 17. f. Cum igitur non sit &c. that the punishment of a corrupt judge that received gift or reward was, * *si inde convictus fuerit, quod imperpetuum a concilio Regis excludatur, terrasque, res, redditus, & proventus bonorum suorum amittat per unum annum; qui, si proventus non habuerit, puniatur per discretionem, decretum regni & consiliariorum Regis*, and says that what Fleta calls *sacramentum justiciariorum*, in vet. Magna Charta is called *juramentum consiliariorum Regis*; for the judges of England are of the Kings counsel for, in, and concerning the laws of the realm.

(C) Their Original and Power.

1. **THE King's Bench** is eyre and more than eyre; for if the King's Bench comes into the county, where any commission in eyre is, the eyre shall cease, and the justices at their coming shall send to all the justices who have power of oyer and terminer of felony and trespass, that they send before them all indictments not determined, and shall send for the records in their keeping; and all the Sheriffs of the county shall come and put in their indictments, and also the coroners their rolls; per Shard. Br. Judges, pl. 16. cites 27 Aff. 1. & 2.

[31]

2. The justices in eyre after the eyre is determined shall put their records in Bank, which is Banco Regis, and the same execution, and the same form of execution (as before justices in eyre) shall be determined before the justices of Bank. Quod nota bene. Br. Judges, pl. 8. cites 14 H. 7. 20.

The C. B. shall cease by the coming of the justices in eyre. Br. Jurisdiction, pl. 116. cites F. N. B.—4 Inst. 185. cap. 33. S. P. But that they yielded to B. R.

3. If pleas are held in the county, and after the justices in eyre come into the same county, now the justices in eyre shall hold those pleas which were held in the county before them in the same manner as they were held before the others in the county, and they shall adjudge execution upon any recovery had in the county in the same manner as the others should do by fieri facias or elegit, and yet there are other justices and another Court, and this case was granted by the justices. 15 H. 7. 5. b.

Justification.

(A) Who may justify the detaining of a Thing till Satisfaction.

See Inns, &c. (B)—Trespass.

[1. IF I send my *clothes to a taylor* to make, he may keep them till satisfaction for the making. Tr. 3 Ja. B. R. Per Williams.]

Fol. 92.

in the 6 Carpenters Case.—Palm. 223.—Cro. C. 272.—Hob. 42.—Mo. 877.—Roll. R. 449. per Doderidge in Case of Robinson v. Walker.

8 Rep. 147.

And he is not compellable to bring the clothes home, or deliver them, until he be paid for them, or be satisfied upon the delivery, and that is to be proved upon evidence. Cro. J. 626. Mich. 19 Jac. B. R. Waring v. Perkins.—But he cannot sell it; because the keeping the apparel is no charge, as a horse is to an inn-keeper. Yelv. 67. Trin. 3 Jac. B. R. in the Hostler's Case.

[2. But if I contract with a taylor that he shall have so much for the making of my apparel, he cannot keep them till satisfaction for the making. Tr. 3 Ja. B. R. per Williams.]

[3. If the lord, who has estrayes by prescription, takes an *estray and proclaims it* according to the law, and keeps it for diverse months, and after, within the year, the owner claims it, the lord may justify the detaining of it till amends made for the eating. Pasch. 5 Ja. B. between Taylor and James, per Curiam. 44 E. 3. 12.]

S. P. Br. Justification, pl. 17. cites 44 E. 3. 12.—See Estray (E).

[4. But otherwise it is if the lord works the *estray*; for this makes him a *tortfeasor*. Mich. 13 Ja. B. per Nichols.]

See Estray (E).

[5. If the lord of a *fair* hath used to have toll for every beast sold within it, and upon a sale the lord seizes the beast sold for non-payment of the toll, he may justify the detaining of it till payment of the charge which he has had in *keeping it, as well as payment of the toll. Mich. 13 Ja. B. per Nicols.]

* Orig. (Teigner). Cro. C. 271 S. C.

[6. If A. possessed of *beasts* delivers them to B. to pasture for 12d. a week, and after A. sells them to C. and C. comes to B. and demands of him to deliver them, and he refuses to deliver them till satisfaction given for the pasture; this is not lawful; for he ought to have his remedy for the pasture against A. who made the contract. Mich. 8 Car. B. R. between Chapman and Allen, adjudged upon a special verdict in a trover and conversion, where C. brought trover and conversion against B. and all this matter found; and that B. after the demand made by C. upon payment for the pasture by A. delivered them by command of A. to a stranger, and so a conversion. And this intratur. Hil. 7 Car. Rot. 419.]

[32]

7. *Carrier* may detain for his hire. Per Holt Ch. J. 2 Salk. 654. Mich. 10 W. 3. in Case of Hartford v. Jones.

S. P. But if he once parts with the possession of them, he

8. Every *master of a ship* may detain goods till he be paid for them, that is *for their freight*; per Holt Ch. J. 12 Mod. 447. Pasch. 13 W. 3. Anon.

cannot retake them. Per Holt Ch. J. 12 Mod. 511. Pasch. 13 W. 3. Anon.

(B) Of what.

So if B. has a *heap of corn*, and A. will intermingle his corn with B.'s corn, B. shall have all the corn, because this was done by

1. **I**F A. flings his *corn into B's boat*, or A. loads his corn in B's cart, or A. puts a *saddle on B's horse*, and then puts him into his own ground; in this case, B. may very well take his cart and boat and horse away, and keep and detain the goods, without being any trespassor, and may justify the detaining till A. brings his action of detinue to recover them; or his *replevin* for them. 1 Bulf. 96. Hill. 8 Jac. B. R. Anon.

A. of his own wrong. Cited by Coke Ch. J. 2 Bulf. 323. in Case of *WARD v. EYRE*, as adjudged in the Case of *Shordish v. Moore*.—So it is in the Case of *money*, if *two bring at play*, and the *one* of them will *intermingle his money in the other's heap* of money, he shall now have all; for this is done by him of his own wrong, per Coke Ch. J. who said it was so adjudged in one *Sir RICHARD MARTIN's Case*; because his own proper money or corn cannot now be known, and therefore this intermingling being his own act and of his own wrong, by the law he shall lose all; for this is done by him only as a trick thinking thereby to deceive the other. Ibid.

3. *Deeds deposited* for security of money borrowed will not be decreed to be delivered up without payment of the money. Fin. R. 10. Mich. 25 Car. 2. *Fitzjames v. Fitzjames*.—58. Hill. 25 Car. 2. *Newman v. Jones and Trefilian*.

4. Detainer of *goods cast away* till they were paid for their pains is good; and *salvage* is allowed by all nations. 2 Salk. 654. Mich. 10 W. 3. B. R. *Hartford v. Jones*.

Land.

See Devise. (A) Where Land shall be *taken as Money*. Or *Money as Land*.

But where the bond was to pay to the hus-

1. **MARRIAGE** agreement to lay money out in land for a jointure to uses, remainder to the use of the right heirs of the husband, after the husband's and wife's death with-
out

out issue. The money unlaidd out was decreed to the heir. 2 band his ex-
 Jac. 2. 2 Chan. Rep. 400. Knight v. Atkins. ecutors, &c.
 died, leaving issue, and the issue died, and the husband received a part, and devised the residue for and the wife
 payment of debts, as part of his personal estate, it was decreed to his executor. Chanc. Rep. 30.
 4 Car. 1. Ferrers v. Ferrers.

2. A. married M. the daughter of J. S. with whom A. had [33]
 1500 l. M. died leaving two daughters, A. entered into articles
 with J. S. that the 1500 l. portion, and 1500 l. more, which he
 gave out of his own estate, *should be secured for a purchase of*
lands, or leases of lands, and paid to the daughters at 21, or
marriage. Per Cur. If the money had been invested in land,
 and the daughters died before the day of payment, the lands
 would have gone to the heir of them, but *since it is in money,*
 if both die before the time, it shall go to the father, his executors
 and administrators. N. Ch. R. 36. 14 Car. 1. Wentworth v.
 Young.

3. J. S. before and in consideration of marriage with J. D. S. C. cited
 entered into articles under hand and seal, to lodge 100 l. in the by the Mas-
hands of J. N. to be laid out in land for the life of J. D. the wife ter of the
for a jointure, with remainder over. The 100 l. was lodged ac- Rolls.
 cordingly; after J. S. dies, and a creditor of J. S. *sues the wife* Pasch. 1688,
his administratrix. Upon a special verdict finding as above, as the Case
 the 100 l. was adjudged not to be assets at law; for the intent of Whit-
 being that the 100 l. should be vested in land, it was to be no wick v. Jer-
 longer looked upon to be the personal estate of J. S. 3 Chan. min.—S.
 Rep. 217, 218. cited per Ld. C. Jefferies, as a Case in Ld. C. cited
 Hale's time between Whitticke and Arg. Wil-
 liams Rep.
 174.

4. Bargainee dies, part of the purchase money being paid, but the
 title not being good, the bargainor paid interest, and the bar-
 gainee paid rent, and died before any conveyance. Decreed the
 money paid to be part of bargainee's personal estate. 2 Chan.
 Rep. 139. 30 Car. 2. Cotton v. Cotton.

5. A. on marriage with B. settles a jointure, and *covenants to*
lay out as much money on land as will purchase 120 l. per ann.
to be settled on B. for life, remainder to the heirs of A. A. dies
 intestate without having made any such purchase. B. admi-
 nisters. The heir brings his bill to enforce B. to execute the
 covenant in specie, that so the land might come to him after the
 death of B. but the Court dismissed the bill, 2 Chan. Rep. 271.
 35 Car. 2. Langton v. North.

6. Money by marriage articles was to be laid out on land, to Ibid. 471.
 be settled to the use of husband and wife for life, remainder Mich. 1687.
 to the issue, remainder to the husband in fee: *Proviso, if the* S. C.
husband die without issue, the wife might elect to have the land or mo-
ney, and had six months time to make election. The husband
 died; no purchase was made. The wife was *enfeint* of a daughter
 born soon after the husband's death, but died at a month old.
 The wife was administratrix both to husband and child, and
 elected within the six months to have the money, and gave no-
 tice

tice to the plaintiff the heir and brother of the husband. The bill not being brought till after the death of the daughter, North K. dismissed the bill; but without costs; but in Mich. Term 1687. Jefferies C. decreed for the heir. Vern. 298. Hil. 1684. Kettleby v. Atwood.

So by guar-
dian. Arg.
2 Vern. 353.
cites Den-
nis's Case.

7. Money of infant invested in land by trustees of their own heads, who afterwards dies in his minority, is still to be considered as personal estate; for an infant cannot give authority for, or consent to it, and he might have dissented to it at his full age; and the land is but in nature of a mortgage or additional security for it. 2 Ch. Rep. 377. 1 Jac. 2. Winchelsea v. Norcliff.

But the re-
porter makes
a quære, if
the money
was to be
taken as
land, it had
not been
more rea-
sonable to
let the one
half, (viz.)
the wife's
1500*l.* or
the land to
be purchased
[34]
therewith,
to go to the
heir of the
wife, or the other 1500*l.* or the land to be purchased therewith to go to the heir of the husband. Ibid.

8. 1500*l.* of the husband's and 1500*l.* of the wife's money was agreed to be laid out in a purchase of land, and to be settled on the husband for life, remainder to the wife for life, remainder to the issue of the marriage, but no mention where it should go afterwards in default of issue. The husband and wife died without issue. The question was, whether the executor of the husband, or executor of the wife, or the heir of the husband, or the heir of the wife, should have the benefit of these articles? And decreed, that the articles making the money as land, it should be taken as real estate, and go to the heirs of the husband, and not to the heirs of the wife, in regard, that in the common usage and way of conveyances and settlements, the remainder in fee was in such case limited to the heirs of the husband. Wms's Rep. 175. cites it as in Ld. C. Jefferies's time. Sir Jonathan Atkins's Case.

9. Money, agreed to be laid out in a purchase for better securing a jointure, was not laid out during the husband's life, and the husband died without issue of the marriage, was decreed by the Master of the Rolls to the widow, in satisfaction of what the jointure settled on her was short of the agreement. 2 Vern. 5. Tr. 1686. Wharton v. Wharton.

10. Money by marriage articles was to be laid out in land, and settled on the husband and wife and their issue, remainder to the heirs of the wife. The wife died, and after the husband died. The money shall go to the heir of the wife, and not to the administrator of the husband. 2 Vern. 101. Pasch. 1689. Lancy v. Fairchild.

S. C. cited
2 Vern. 353.
Arg.

11. Lunatick's money invested in land by committee was decreed to be still accounted as personal estate, and to go to the next of kin, and not to the heir, and if the next of kin will not take to the land, the committee must, and answer the money. 2 Vern. 192. Mich. 1690. Audley v. Audley.

So if part of
the money
was paid,
and the bar-

12. A. under hand and seal articles to sell land to B. but without any other execution thereof, they by mutual consent go off of the bargain, (by releasing each other, or cancelling the articles &c.) and then

then the bargainor dies indebted; this shall not be *assets*. 3 Ch. R. 220. Hill. 1690. E. of Pembroke v. Baden. bargainor re-
pays it, and
they agree to

go off as aforesaid, and then the bargainor dies. Ibid. — But if the bargainor dies, part of the money having been paid him, and no conveyance made to the bargainee. As the bargainee had a remedy in equity to compel the heir of the bargainor to make the conveyance on payment of the residue of the money, so the heir may be forced by creditors to convey, and the bargainee to pay the money as the testator's personal estate, and it shall be *assets* to them in law and equity when paid. 3 Ch. R. 220. E. of Pembroke v. Baden. — 2 Vern. 215. S. C. & P. but sites it decreed by Jeffries C. with assistance of Master of Rolls and 2 J. that the purchaser, being willing to go off, should be repaid, and his purchase discharged. But per Lords Commissioners decreed, that the purchase go on and the heir convey, and the money be paid to the executors. — It seems that after such contract, the bargainor dying, the bargainee and the heir of the bargainor cannot, by agreement to break off the bargain, prevent the executors of the bargainor from having the money, though no debts are due; for that the testator having done an act, whereby he intends to deprive the heir, and make it a personal estate, cannot prevent it after. 3 Ch. R. 221. E. of Pembroke v. Baden.

13. It was agreed by marriage articles, that 500 l. part of the wife's portion, should be placed in the hands of A. and B. to be put out at interest till it could be invested in a purchase with the consent of the husband and wife of lands &c. to be settled on husband and wife for their lives, and the life of the survivor of them, remainder to the heirs of their two bodies, remainder to the heirs of the body of the wife, remainder in fee to the wife's brother the plaintiff. Wife dies without issue. Husband dies; the 500 l. not laid out; but husband received the interest during his life. Per two commissioners, this is personal estate, and to go to the administrator of the husband surviving; because there was no positive covenant that it should be laid out in land. 2dly. It was not to be laid out in land, but by the consent of husband and wife, and no purchase was made or consented to; and if settled, the husband had been tenant in tail, and might have barred the issue. Per commissioner Hutchins contra, that the intention was plain, and that the husband became only tenant in tail after possibility of issue extinct, and conceived this Case governed by the Cases of *WHITWICK v. JERMIN, †LAWRENCE and BEVERLEY, †ANNON v. HONEYWOOD, and ‡KETTLBY v. ATWOOD. 2 Vern. 227. Pasch. 1691. ¶ Symonds v. Rutter.

* 3 Ch. Rep. 217. — Cited Vern. 471. — † Cited N. Ch. R. 165. — ‡ 2 Chan. Cases 117. Trin. 34 Car. 2. — ¶ Vern. 298. 471. — 2 Ch. R. 404. S. C. by name of KETTLBY v. LAMB; says that money agreed by marriage articles to be laid out upon lands, and not being laid out shall go as the lands should have gone had a purchase been made. — 1 Cha. Prec. 23. S. C.

14. A. had issue two sons B. & C. and two daughters M. & N. and by will devised to M. and N. 550 l. a piece, and ordered that it should be laid out in a purchase of lands by his executors within a year after his decease, to the use of M. and N. and the heirs of their two bodies, and if either of them die before marriage, then 150 l. part of the portion of her so dying, or if the 1100 l. should be laid out in land, then so much land as should be of the value of 150 l. should go to the surviving sister, and the remaining 400 l. or land of that value, if the purchase be made, should go to his two sons equally to be divided between them and their heirs. M. died unmarried, N. survived and married J. S. The sons died without issue, and afterwards N. died without issue. The money was not laid out in land, but the heir at law claimed the whole 1100 l. as land; because had it been laid out, the land would have

[35]

have descended to him. But decreed the 550 l. and 150 l. to the husband, the administrator of N. Hill. 1692. 2 Vern. 284. Abbot v. Lee and Cuthbert.

15. Money shall in many cases be considered as land, when bound by articles in order to a purchase; but whilst it remains *still money, and no purchase made*, it shall be deemed as part of the personal estate of such person, who *might have aliened the land*, in case a purchase had been made. 2 Vern. 296. Trin. 1693. in Case of Chichester v. Bickerstaff.

S. C. cited Arg. Sel. Ch. Cases in Ld. Talbot's time, 88. but Ibid. 90. Ld. C. Talbot said, that it is probable, the Court, in that Case, went upon some reason which induced it to think, that Sir John Chichester looked upon the money as personal estate; for otherwise

the authority of that case is not to be maintained, being contrary to all former resolutions, and also to a late one in the House of Lords, of the Countess of Warwick v. Edwards.

17. A. agrees for the purchase of land incumbered with mortgages and judgments; the purchase money was lodged in an indifferent hand to discharge the incumbrances, on settling the quantum, and executing assignments; but the purchaser dies in the interim, and left *not assets sufficient to pay his debts on bond*. Lord Wright held, that the money was bound by the agreement, and must be applied to pay off the incumbrances on the land. Ch. Prec. 174. Mich. 1701. Farr v. Middleton.—The lands and money are mutually bound by the agreement. Per Ld. Harcourt. Hill. 1711. Ch. Prec. 323. Greenhill v. Greenhill.

18. In equity, land agreed to be sold shall go as money, and money agreed to be laid out in land as land; but *quære*, if money be articulated to be laid out in land in a marriage settlement, upon *failure of issue*, and there is no issue, but *debts by simple contract*, whether this money shall be taken as land, and thereby *defeat creditors*? Mich. 4 Annæ. 1 Salk. 154. (seems to be the author's own memorandum, and *quære*.)

On an appeal to the Ld. Ch. Cowper, this

19. A. before his marriage with M. agreed by articles to add 700 l. to M's 700 l. portion, and the securities for the monies were assigned to trustees, and agreed to be invested in land, and settled on A. for

for life, remainder to M. for life, remainder to the first &c. son in tail male, remainder to daughters, remainder to the right heirs of A. They intermarried; A. died without issue, but made his will, and devised some lands to M. and devised the rest of his real estate in the county, and city of York, and elsewhere in Great-Britain, to J. S. And gave his personal estate, and all his securities for monies, to M. whom he made executrix. Many of the securities remained unaltered; but some of the money had been put out upon other securities, and was mentioned to be in trust for A. his executors and administrators. Lord Harcourt said, that the articles had, in equity, changed the nature of this money, and turned it, as it were, into land; and therefore, as to so much of the 1400l. as is subsisting upon the securities, on which it was originally placed, or on any other securities, where no new trust has been declared, it ought to be considered as real estate; but whereas 250l. part of the 1400l. had been called in by A. and placed out on other securities, on a different trust, that shall be taken to be personal estate; forasmuch as there being no issue of the marriage, it was in the power of A. to alter and dispose of it, as against the heir at law, though not against M. and this placing out upon different trusts, he took to be an alteration of the nature of it, since his declaring the trust to his executors seems tantamount with his having declared, that it should not go to his heir. Wms's Rep. 172. 176. Mich. 1711. *Lingen v. Souray*.

decree was affirmed. Pasch. 1715. Wms's Rep. 176. in a note there. —Ch. Prec. 400. S. C. Pasch. 1715. by name of [36] *Lingen v. Souray*; but takes no notice of the point here, of some of the money being placed out on different trusts, but is only as to the money agreed to be invested in land, being to be considered as land; and that the personal estate devised to her being

much more than the provision intended by the articles, it must be taken as a satisfaction of what she would otherwise be intitled to by the articles. Abr. Equ. Cases, 175; pl. 5. S. C. but is an abridgment only of Ch. Prec. and has not the point in Wms's Rep. — S. C. cited Arg. says, that it appears by the decretal order, that there was an assignment of securities to trustees to be laid out in land, and settled, but that, some time after the marriage, the husband called in some of the money himself, and settled it upon the same persons as by the marriage settlement it was to be settled upon, and afterwards, by will, devised his personal estate to his wife, against whom a bill was brought by the nephew as heir at law, and it appearing that 700l. remained upon the same securities at his death, as at the time of the settlement, it was decreed, that that 700l. should be looked upon as land, but the other which was actually taken out by him should not be bound, and that the like distinction was 11 March, 1718. at the Rolls, in the Case of *CHAPLIN v. KORNAR*. Sel. Ch. Cases, in Ld. Talbot's Time, 87, 88. Pasch. 1735. in Case of *Lechmere v. Lady Lechmere*. — But Lord C. Talbot disapproved the distinction, and said, that none of the Cases did, nor was there any thing in reason, to warrant it; and that he was no ways satisfied, that that Case was resolved upon that reason; for in that case, the husband had altered the trusts and the limitations of it. Besides, in that case nobody had an interest but himself and his wife; and the Court, as appears by the decree, laid great stress upon the change of his intent appearing by changing the trust; And in the Case of *CHAPLIN v. KORNAR*, the husband alone was to have the benefit of the articles, and so neither of those Cases like the Case of *Lechmere v. Lechmere*. Ibid. 91, 92.

20. A. on his marriage with M. conveyed lands in trust for himself for life, remainder to trustees to support &c. remainder to M. for life, remainder to the first &c. son in tail male, remainder over; and assigned banker's assignments, (which are personal estate, and go to the executors) to the same trustees in trust to pay the profits to such persons as would be intitled to the land so settled; and in case the principal should be paid in according to the act of parliament, then the trustees should lay the monies out in land, to be settled to the same uses. A. died without issue; the brother and heir of

of A. brought a bill against M. and A's executor; and it was decreed, that these annuities, or banker's assignments, being redeemable by parliament, were as a mortgage assigned to trustees, and directed, when paid in, to be invested in a purchase, and settled as the fee simple lands were above settled; and therefore, though M. was to have an estate for life in annuities by the jointure deed, yet after her death the annuities should not be looked upon as personal estate, so as to carry a moiety, by the custom of London, to her representatives, but as money directed to be laid out in land, and to be as real estate, to go to the plaintiff after her death, as heir of A. Wms's Rep. 204. Trin. 1712. Disher v. Disher.

[37] 21. A. died intestate, leaving a widow and two daughters; after his decease 200 l. in gold *was found hid* in a hole in the wall, and 200 l. in silver in a box, besides his stock in trade. The widow invests the 400 l. in a purchase of lands of inheritance, and settles the same to herself for life, remainder to her two daughters in tail, remainder to her own right heirs; both the daughters died without issue intestate; the defendant as heir to the mother entered on the lands; plaintiff as next of kin, and as administrator to the daughters, brought his bill to subject the land to the 400 l. viz. to refund two thirds thereof, as being personal estate belonging to the daughters; and it was proved, that the said several sums were invested in this purchase. The Master of the Rolls decreed for the plaintiff; but upon appeal to the Lord Keeper, the decree was reversed, as being within the reason of the Case of KIRK and WEBB, lately affirmed upon an appeal in parliament, that money had no ear-mark, and could not be followed when invested in a purchase. 2 Vern. 440, 441. Mich. 1702. Kendar v. Milward.

22. A. on his marriage with M. settled lands, and also covenanted to lay out 2000 l. (*then in trustees hands*) in the purchase of lands, to be settled on himself and his heirs. A. died intestate, living M. and leaving issue one daughter only; but in his life-time he received 1350 l. part of the 2000 l. M. took out administration, and the daughter brought a bill for a specifick performance of the covenant, and also for two thirds of the personal estate, under the statute of distributions. It was held by the Master of the Rolls, that the remaining 650 l. ought to be taken as land, and go to the plaintiff as heir, the dispute here not being between the father and the party who was to pay the money, but betwixt the heir and executor, who became intitled to the money, subject to the covenant; and that it was the rather to be deemed a real estate, because it was part of the marriage agreement, and made in consideration of a marriage, and marriage portion; and decreed the 650 l. to be brought before the master for the benefit of the plaintiff, (being an infant) but would not decree it to be laid out in land, because if the plaintiff should die before such disposition, it would go to the heir of course. Wms's Rep. 483. Mich. 1718. Chaplin v. Horner.

23. A.

23. A. being a freeman of London, agrees on his marriage with M. and covenants with trustees, to add 1500 l. to the 1500 l. portion of his wife to purchase lands within two years after the marriage to be settled on A. for life, remainder to M. for life, in lien and bar of dower and jointure; remainder to the issue; A. died, leaving M. and two children. Lord Macclesfield held, that, from the articles executed, the money was a debt, which A. was obliged to pay; that it was no part of the personal estate from that time, but must be looked on as land, and then it could be no bar of the customary part of the personal estate; that the custom did not operate at all till the party's death, and then whatever personal estate was left, was to go according to it. Mich. 1718. Ch. Prec. 505. Babington v. Greenwood.

24. Money was articted to be laid out in land to be settled on the first &c. son in tail; and because the Court, in order to preserve the chance to the second son, would not decree the money to the eldest, but ordered it to be invested in a purchase, pursuant to the articles, the eldest son got one to lend him a purchase, and to settle it, with an intention forthwith to suffer a recovery, and to re-convey the estate to the seller; and though all this appeared by the master's report, yet the Master of the Rolls (after some hesitation) allowed it. Wms's Rep. 485. at the bottom, in an addition there, cites Pasch. 1723. v. Marsh.—And the reporter adds a quere, whether the money might not better have been paid to the eldest son?

25. On the marriage of A. with M. the manor of K. was conveyed to the use of himself for life, remainder to the first &c. son in tail, remainder to himself in fee. And it was agreed, that 10,000 l. part of M's portion, should be vested in land, and settled as the manor of K. was, and in the interim, to be placed out on securities, and the interest to go as the rents and profits of the manor of K. should go. A. died, leaving B. his only son; B. the son levied a fine of the manor of K. to the use of himself in fee, and died without issue in testate. The manor of K. descended to E. as next heir, though otherwise a remote relation. Lord C. Macclesfield held, that B. had election to have made this money, or to have disposed of it as money, but then he must have done something to determine such election, which is not done in the present case; that if there had been so much as a *parol direction* from B. for the payment of the 10,000 l. to his administratrix, he should have had a regard to it; but that as to the fine it was immaterial, B. having as good a power to dispose of the manor of K. or of the 10,000 l. against all but his issue before the fine as after; and issue he never had; and ordered the security for the 10,000 l. to be assigned; but decreed the arrears of interest, and a proportionable part of the interest of the broken part of the last half year, to be paid to B's administratrix. 2 Wms's Rep. 171. Trin. 1723. Edwards v. Lady Warwick.

26. Lands were devised to trustees and their heirs in trust to apply the rents and profits until sale, for the benefit of all his children, A. B.

This decree was affirmed on appeal in the House of Lords. Ibid. 176.—S. C. cited by Ld. C. Talbot, who said, he was bound by it. Sel. Ch. Cases, in Ld. Talbot's time, 90 Pasch. 1735. in Case of [38] Lechmerev. Lechmere.

C. and D. *and the survivors and survivor of them equally, part and share alike ; and on further trust, that as soon as the trustees should see necessary for the benefit of the children, they should sell the premises, and apply the money for the benefit of his children, part and share alike ; the shares of the sons to be paid at 21, and those of the daughters at 21, or marriage.* B. the eldest son, attained his age of 21, died intestate, leaving a widow, and no child. The Master of the Rolls decreed the lands, thus devised, to be personal estate, and the *widow to have a moiety of her husband's share, both of the rents and profits received in her husband's life, and of the money arising by sale ; and upon appeal to Lord C. King, though it was objected that the lands were not absolutely directed to be sold, but as soon as the trustees should see it necessary for the benefit of the children, his Lordship held, that this was within the rule of lands, by being devised to be sold, becoming personal estate ; that here the lands are devised to be sold, and only the time of sale left to the direction of the trustees, and affirmed the decree.* Hill. 1725. 2 Wms's Rep. 321. *Doughty v. Bull.*

27. A. *devised land to be sold by his executors, and with the money to purchase an annuity of 100 l. a year to J. S. for her life, out of which she should maintain her children ; and gave 30 l. to each child to be raised out of the said annuity and personal estate, and the overplus of his personal estate he gave to J. S. who died soon after the said A. Upon a bill by the administrator of A. for sale of the lands, which was opposed by the heir, Ld. C. King held, that the intention of the will, was to give all away from the heir, and turn the land into personal estate, which must be taken as it was at the death of A. and ought not to be altered by any subsequent accident, (as by the death of J. S.) and that being made personal estate, the heir ought not to have the rents till sale ; and decreed the land to be sold, and the money, as personal estate, to be paid to the plaintiff, he paying the children's legacies. But the heir at law was ordered his costs.* Mich. 1725. 2 Wms's Rep. 308. *Yates v. Compton.*

28. Lands descended to the wife were charged with several debts, and baron and feme, for payment thereof, vested the same in trustees, to be sold, and the surplus to be paid to baron and feme, as they by writing should direct. They sold enough to pay the debts ; the wife died ; the husband devised all his lands lying in &c. to his brother, and left a daughter, who claimed the lands ; but decreed, that the land must be considered in equity, as if actually sold, and must go as the money would have gone ; and whether considered as money or land, it would have gone to the husband, and the devise good. Pasch. 1727. Abr. Equ. Cases 396. *Collingwood v. Wallis.*

29. A. having five nieces, his co-heirs at law, who had each of them several children, devised a very considerable estate to trustees, and their heirs, *to be sold, and to put the money arising by such sale into five equal parts and shares, and out of each fifth part or share,*
to

to pay 1000 l. a-piece to the several younger children of each of his five nieces, and the residue of the money of each fifth part, to be paid to such of his said five nieces as should be then living, and in case of their deaths, then their shares to be equally divided amongst their younger children, which should be alive at the time the dividends were, or ought to be, made; great part of this estate was sold many years since, and the 1000 l. a-piece to the several children of the five nieces had been paid; after which the nieces themselves, being intitled to the remainder of the trust estate, chose not to have it sold, but continued to receive the rents and profits thereof, in five equal shares for several years; and they being all now dead, the eldest son of each of them claimed it as a resulting trust for their respective mothers, and that from them it descended to their eldest sons as heirs at law; and the rather, for that all the purposes for which the trust was created, being satisfied, their mothers might in their life-times have compelled the trustees to have executed conveyances to them respectively, of the unsold estate; and they, as their heirs at law, stood in their place, and had the same right; and that otherwise it would be in the trustees power, by delaying or hastening the sale, to give the surplus to whom they pleased; and that it was now years ago since the trust was created, and yet great part of the estate remained still unsold; but the Court directed the rest of the estate to be sold, and the money to be divided among the younger children of each niece, according to the will, as it would have been if the nieces had died before the 1000 l. a-piece to their younger children had been paid, or before sufficient of the estate could have been sold for the raising thereof, the testator plainly intending, that the younger children of each niece, not their eldest sons, or heirs at law, should stand in their mother's place; and greatly blamed the trustees for having so long delayed the sale. Pasch. 1727. Abr. Equ. Cases, 396, 397. *Davers v. Folkes*.

30. A. in consideration of 6000 l. portion with M. by marriage articles, covenanted with trustees, to lay out, within one year after the marriage, the said 6000 l. and to make it up 30,000 l. in the purchase of lands, to be settled on A. for life, remainder to trustees to preserve, &c. remainder for so much as would amount to 800 l. a year to M. for a jointure, remainder of the whole to the first, &c. son of the marriage in tail male, &c. remainder to trustees for 500 years to raise daughters portions, remainder to A. his heirs and assigns for ever. But if no daughters, then the term to cease for the benefit of A. his heirs and assigns for ever.—After the marriage, A. purchased several estates in fee, but never settled them; and likewise purchased several terms, and died intestate, and without issue, leaving 1800 l. a year real estate to descend upon the plaintiff, his nephew, and heir at law. And A. further covenanted, that until the 30,000 l. laid out as aforesaid, interest should be paid for the same after the rate of 5 l. per cent. unto the persons intitled to the rents, &c. of the lands when purchased.—M. took out

administration, and the plaintiff by bill prayed an account of A's personal estate, and to have the covenant carried into execution, his remainder, by the death of A. without issue, now taking effect; and also to have some *purchases* compleated which were *left incompleat at A's death*. It was insisted for defendant, that plaintiff was *not privy to any of the considerations in the covenant*, and so could not compel M. to lay the 30,000 l. out for his benefit. But if he could, that the 1800 l. a year *lands descended* to him ought to be taken as a full *satisfaction*. But both points were decreed at the Rolls for the plaintiff, the heir at law. And upon coming before Lord C. Talbot, his Lordship thought, that the intent of A. was, that the 30,000 l. should, at all events, be laid out in land, and that though *the 30,000 l. was not deposited in trustees hands*, (in which case he observed it seemed to be admitted on both sides, that it must have been looked upon as real estate) yet upon the Case of the Countess of WARWICK v. EDWARDS, where the money was decreed to go as land, though to a collateral heir, who was not within the considerations of the settlement, by which he said he thought himself bound, he looked upon it as a *settled point, that where the securities are appropriated, the money shall go as land, even to a collateral heir or general remainder-man*, unless there appears some variation in the party's intent; and nothing appearing to the contrary, but that the intent of A. remains as it was at the time of the covenant entered into, and so distinguished it from the Case of KINGSTON [OR LINGEN] v. SOWRY, he thought this Case fell within the common known rule, that money articed to be laid out in land, is to be looked upon as land. Sel. Ch. Cases, in Ld. Talbot's Time, 80 to 92. Pasch. 1735. Lechmere v. Lady Lechmere.

31. A. entered into articles with J. S. for the building an house on A's land, and agreed to give J. S. 1000 l. for the same, but before the house was built A. died intestate. The son and heir of A. and on whose inheritance the house was to be built, brought his bill against the widow and administratrix, to compel her specifically to perform this agreement, and decreed accordingly. 2 Vern. 322. Mich. 1694. Holt v. Holt.—S. C. cited by Ld. C. Talbot, who said, that if a man *articles for a purchase, and binds himself, his heirs, executors, and administrators*, the heir is intitled to have the purchase compleated, and may compel the executors to do it, as appears from the said Case of Holt v. Holt. And said further, that *wherever a man's design appears to turn his personal estate into land*, this gives his heir an advantage which this Court will never take from him. Sel. Ch. Cases, in Ld. Talbot's Time, 91. Pasch. 1735. in Case of Lechmere v. Lady Lechmere.

(B) Where

(B) Where *Money* being ordered to be laid out in *Land*, and settled, Chancery will *decree the Payment*, or inforce the laying it out.

1. **I**N Chancery it was agreed, to be the constant practice of the Court, that if there be *covenants to purchase* an estate to such and such uses, and money lodged in trustees, for that purpose, the Court will compel a purchase to be made to the uses; though *covenantor died before*; but if the *first estate is an entail, with remainders over*, and the *person to take it be living at the time of the death of him whose money it is*, there Chancery shall not compel a purchase for the sake of the remainder; because tenant in tail may destroy it as soon as it is created; and the Court will not do a vain thing. 12 Mod. 521, 522. Pasch. 13 W. 3. Anon. *And if a man covenant to purchase for him and heirs of his body by such a woman, remainder to his own right heirs, and he dies without issue, and without making any purchase; the Court will not compel the executor to make a purchase for the heir, because that attached in himself, and is extinguished in him.* 12 Mod. 522. ut sup.

2. A. by will directed money to be invested in land; and to settle and intail the same on B. for life, he paying 200 l. a-piece to L. and M. and after his decease, to the heirs male of the body of the said B. and the heirs male of the body of every such heir male, severally and successively, &c. and for want of such issue, to C. for life, &c. B. had obtained a decree about the year 1690, for payment of the money to him, in regard he was to be tenant in tail, and might bar the remainders, and in 1703 died without issue. Lord Cowper held, that though it should be admitted that B. was tenant in tail, yet the money ought not to have been decreed to him, but in equity the trust ought to be strictly pursued. But he said, that forasmuch as B. lived ten years after the first decree and payment of the money to him, and probably, had it been settled in land, would in his life-time have barred the intail, it was too late now to fetch the money back from him, in case he was tenant in tail; and said, quod fieri non debet factum valet. 2 Vern. 551. Pasch. 1706. Legat v. Sewell and Weller.

3. 2000 l. was agreed by marriage articles to be invested in land, to be settled upon the husband and wife for their lives, remainder to the heirs of the body of the wife by the husband, remainder to the heirs of the husband. The wife died; then the husband died intestate, and no purchase made by him, but he had the whole money in his hands. They left issue one son and three daughters. Administration was granted to the eldest daughter. The son brought a bill against his sister (the administratrix) to have the money paid him, he electing not to have it laid out in land; and in regard the son would have the intire interest in the lands when purchased and settled, and the absolute power over them, the Court decreed him the money, and the administratrix to be indemnified; and said, *that*

[41]
A. devised 100 l. to be laid out in a purchase of lands in fee, and the same to be settled upon B. C. and D. and their heirs equally to be divided. B. dies, leaving his heir an infant; and

C. and D. that under those circumstances to decree a settlement, would be together to decree a vain thing, which the son the next moment, by fine with the infant heir, only, might cut off. At the Rolls, Mich. 1710. Wms's Rep. bring a bill 130. *Benson v. Benson*. for the

1000 l. Lord C. Cowper directed the shares of C. and D. to be paid to them in money, according to their election, the words of the limitation making a *tenancy in common*, and they having it in their power the next moment to turn it into money. But the infant heir being incapable of making an election, his share was directed to be brought before the master, and put out for the infant's benefit. Besides, if he should die in his infancy, such election might be prejudicial to his heir. Wms's Rep. 389. Mich. 1717. *Seeley v. Jago*.

S. C. cited 4. So where money was directed to be laid out in land, and 2 Wms's settled on *M. for life*, remainder to her first, &c. son in tail, remainder to such son in fee, and in the mean time the interest to go as the profits of the land, &c. *M. and B.* (who was her only son) agreed to divide the money, viz. a third part to *M.* and two thirds to *B.* In this case *Ld. C. Parker* said, that since the son might, by a fine only, bar these limitations, it would be in vain to decree a settlement which might be cut off the same moment it was made, and directed the trustees to pay the money to *M. and B.* pursuant to the agreement, and to be indemnified; but said, that if there had been two sons, or any person in * remainder, he would not have decreed the payment. Wms's Rep. 470, Trin. 1718. *Short v. Wood*.

* If a remainderman has but a chance for the estate, or the money, which cannot be barred without a common recovery, there, in regard the tenant in tail may die before such recovery suffered, or in the vacation, when a recovery cannot be suffered, equity ought not, in violation of the intent of the party, to decree payment of the money to the tenant in tail, but to decree a settlement, that the chance intended to the remainder-man may be preserved. Wms's Rep. 471. says, it was cited by *Ld. C. Parker* as so determined in the Case of *Colwall and Dr. Shadwell*.

S. P. by *Ld. Cowper*, who said, it was admitted that it ought to be 5. So it seems to be, if the son had been an infant, the Court would not have ordered payment of the money; for during the infancy no fine could have been levied. Wms's Rep. 471. at the end of the Case of *Short v. Wood*, ut sup.

so, because the infant has no capacity to bar the intail until of age, and may possibly die before, 2 Vern. 552. Pasch. 1706. in Case of *Legatt v. Shewell*.

This decree was afterwards affirmed in the House of Lords. Ibid. 176. 6. *A.* on marriage with *M.* settled the manor of *K.* to the use of himself for life, remainder to the first and every other son of the marriage in tail, remainder to himself in fee. And it was agreed, that 10,000 l. part of *M.*'s portion, should be vested in land, and settled as the manor of *K.* was, and in the mean time to be placed out upon securities, and the interest to go as the rents and profits of the manor of *K.* should go. *A.* died leaving only one son *B.* Upon application to the Court by *B.* he being tenant in tail, remainder to himself in fee, the money would have been ordered to him; *B.* died without issue, and the manor of *K.* descended to *E.* in fee, who praying that the 10,000 l. being placed out on a mortgage, the mortgage might be assigned to her. Lord C. Macclesfield decreed the same accordingly, only his Lordship directed the interest due at *B.*'s death, to go to his administratrix; and he dying in

in the middle of the half year, he ordered, (as the reporter says he understood it) that the interest should not be taken as a rent, but should be apportioned, and paid to the administratrix in proportion. 2 Wms's Rep. 171. to 176. Trin. 1723. Edwards v. Lady Warwick.

(C) Grant or Devise of Lands good, where they
lie in several Places.

See Fines
(E. 2. 2.)—
Grant (H.
2. 4) and
other Proper
Titles.

1. **T**HE King seised of the *rectory of A. which extended into the counties of B. and C.* by letters patents *grants the rectory of A. in the county of B. to J. S. in fee, cum omnibus terris glebis, &c. & aliis hereditatibus cum suis pertinent. dictæ rectoriæ spectant.* The question was, if those things in the county of C. shall pass by his letters patents, by those words, *dictæ rectoriæ spectant.* ? And it was urged, that those things in the county of C. cannot belong to the rectory of M. in the county of B. And that it is not aided by the statute of misnolmer or non-nolmer, &c. For the patent is served by the rectory in the county of B. and vouched a case of a prebend which extended into diverse towns, which the Queen granted by name of the prebend of D. in one of the towns, that nothing passed in the other town. But per Manwood Ch. B. the tithes in the county of C. shall pass; and per Shute J. though they are not belonging to the rectory in the county of B. yet they are belonging to the rectory of A. and the words are (*dictæ rectoriæ spectant*) which is to be intended to the rectory of A. generally, and not to the rectory of A. in the county of B. Quære Savil. 55. pl. 118.

2. If A. seised of a *manor extending into two counties, viz. B. and C.* and that in B. is land, rents, and services, and that in C. only services in gross; and grant is made of *the manor of B. cum omnibus terris, &c. & servitiis dicto manerio spectant.* the services of the other shall pass as *dicto manerio spectant.* Per Manwood Ch. B. Savil. 56. in pl. 118.

3. If I grant all my manor of D. in Norfolk to B. and all my land in England parcel of the said manor, all the land shall pass which I have in any other county in England, which is parcel of the said manor. Per omnes J. But per Coke Ch. J. if I have a manor which extends into two counties, and I grant all my manor in one county, nothing of what is in the other county shall pass; and so is 9 E. 4. But in the case before, the subsequent words add to the first words. Roll. R. 407. pl. 43. Trin. 14 Jac. B. R. Anon.

4. A. seised of land in the village of R. and also of lands in the village of S. and both these villages are in the parish of R. A. bargains and sells all his land in R. and covenants to levy a fine accordingly. Adjudged, that nothing of the land in S. passed; for R. shall be intended the vill of R. and not the parish; for a *præcipe* of lands of R. shall be intended of the village, and not

Ow. 61.
Cro. J. 120.
Stork v.
Fox. S. C.
S. C. cited
2 Mod. 236.
2 Roll. 54.
tit. Grants.

S. C. cited of the parish. Noy. 17. STOCK v. POPE, cites 39 H. 6. 14. Br. Ca. 81.— Trespass 11.
Mo. 710.
Whitsey v. Fermor. S. P. —D. 261. b. pl. 27. marg.

5. A. grants all his lands in *Darfield*, in the tenure of J. S. and part of these lands were in another town, viz. in *Wombell*, but the whole land lay within the parish of *Darfield*; and in this case the judge ruled, that the whole land did pass; and *Darfield*, in the first clause, shall be intended the parish of *Darfield*, and not the vill only. Clayt. 61. Boswell's Case.

[43] (D) Grant of Lands Good, where the Grantor, &c. has several Lands in the same Place.

1. A. Made *feoffment* in fee of *Bl. Acre*, in the parish of *D.* to his youngest son, and his heirs, by deed, *habendum after the death of A.* and makes livery *secundum formam chartæ*, and so all void; and afterwards, having other lands in the same parish, conveys all his other lands in the same parish to his eldest son, not demised to the youngest; and adjudged, that the land intended to the youngest does not pass. D. 261. b. marg. pl. 27. cites Pasch. 6 Jac. B. R. Lee v. Eyre.

• See Estate.

* Landlord and Tenant.

See Execution (Y).—
Executor

(U).—

House.—

Wast. Cited

Cro. E. 374.

Day v. Bif-

bitch.—

Where a

termor fixes

such thing,

(A) What Things are removeable by the Tenant.

1. PER Dyer, there is a difference when a *furnace* is fixed to the middle of the house, and when to the wall; for the termor may take it from the middle of the house, but not from the wall; for the wall is worse for the taking it away, and therefore it is wast. And to this Owen agreed. Ow. 71. 37 Eliz. C. B. Day v. Austin.

or fixes a post in the land, and not to the walls, he may take it within the term; but if he permits it to stand till the term be ended, the lessor shall have it; and the taking of it by the termor, within the term, is not wast; for the house is not impaired by it; per Kingmill J. and Grevil Serjeant; quod nullus negavit. Br. Chatties, pl. 7. cites 21 H. 7. 26.

2. Ter-

2. Termor may pull down a *wall made by him*, and it is not wast; per 2 Justices. Ow. 71. in Case of Day v. Austin.

3. *Fatts, coppers, tables, partitions*; were set up by a soap-boiler for the convenience of his trade, and who also *paved the backside*, &c. and these were taken in execution by the sheriff on a fi. fa. and it was held good by Holt Ch. J. 1 Salk. 368. Mich. 2 Annæ, Poole's Case.—Dyer's Fatt is not to be taken on an attachment, if fixed to the walls of the house. Cro E. 374. Day v. Bisbitch.

4. Things set up by lessee for years, for the *convenience of trade*; are removeable during the term by the common law, and not by virtue of any special custom. But *after the term* they are become a gift in law to him in reversion, and are not removeable; per Holt Ch. J. 1 Salk. 368. Poole's Case.

5. Things set up to compleat the house, as *hearths and chimney-pieces*, are removeable; per Holt Ch. J. 1 Salk. 368. Poole's Case.

6. *Hangings and looking-glasses* are not furniture, but only matter of ornament, and not to be taken as part of the house or freehold, but removeable by the lessee of the house; per Ld. Keeper. Wms's Rep. 94, 95. Hill. 1706. Beck v. Rebow.

(A) Lateran Council.

[44]

1. **C**OUNCIL of Lateran was held, anno Dom. 1215, under Pope Innocent the Third, and decreed against all *pluralities of whatever value*. 4 Rep. 79. in Digby's Case. Vaugh. 131. accordingly. Mo. 436. in S. C. by name of ROBINS v. GERARD. It is said to be held under Pope Alexander the Third, in anno 1170, and continued till anno 1179, which was anno 26 H. 2.

2. The Council of Lateran does *not bind the King*, being persona mixta, unless where he voluntarily submits to it. Jo. 387. Pasch. 12 Car. B. R. E. of Hertford v. Leech.

3. The Council of Lateran was received in England *as a general law*, and of as great effect as an act of parliament, which concludes all parties. Hard. 101. Pasch. 1657. in Case of Staveley v. Ullithorne.

(A) Latin.

Resolved that this statute, as to the first branch, was introductive of a new law, but as to the other

1. 36 E. 3. 15. **E**NACTS, that *all* pleas, which shall be pleaded in any Court whatsoever within this realm, shall be pleaded, shewed, defended, answered, debated and adjudged in the English tongue, but entered and inrolled in the Latin. Howbeit the laws and customs of this realm, as also the term and processes, shall be holden and kept as before this time hath been used.

branches they are declarative of the antient; for of antient time, and before the Conquest, the original writs, and all the process and proceedings upon them, were entered in Latin; and infinite records before this time are extant entered in Latin, and yet for the better illustration of the truth, a deed in English, Latin, or Dutch, &c. may be entered either in a plea or special verdict. 10 Rep. 132. b. Mich. 11 Jac. B. R. Osborne's Case.

Words which pass under the name of Latin, are of four sorts. 1. Good Latin allowed by grammarians. 2. Words significant, and known to the sages of the law, but not allowed by grammarians, nor having any countenance of Latin. And these two sorts are within this act. 3. False or incongruous Latin; this shall abate an original writ, but not vitiate any judicial writ, count, pleading, or judgment. (For in all such cases, false Latin shall be amended;) A multo fortiori, it shall not avoid a grant or any deed, &c. and therefore neither false Latin nor false English will avoid a grant or other deed, when the intention of the parties appears. 4thly. Insensible words. 10 Rep. 133. the second Resolution in Osborne's Case.

S. C. cited 10 Rep. 132. b. in Osborne's Case, and 2. In *præcipe* quod reddat, the writ was *filio & heire*, where it should be (*filio & hæredi*) and therefore it was abated. Br. Brief, pl. 49. cites 41 E. 3. 21.

there is also cited the 29 E. 3. 31. a. per Sharde J. That Latin is a language formal to put in writs, &c. and English is the language of the lay-gents. And yet when *English* or *French* is parcel of a name, there it shall be permitted in a writ; and therefore if the name of a manor be *A. beside K.* he may demand it by a *præcipe* by this name in English; for it may be, that notwithstanding the name, the said manor lies in K. and therefore if in *præcipe* he should say *A. juxta K.* the writ will abate, if any part of the manor extends into K. And it is there said, that this also agrees with 44 E. 3. 12. b. and 29 E. 3. 31. And so if the surname of one be *Fitz-John*, he may be named so in a writ; for if the writ be *præcipe W. filio Jobannis*, it will be a good plea to say, that his father has another Christian name, as Richard, &c. and so abate the writ, and so it is held 29 E. 3. 30. b. 44 E. 3. 12. b. and 13. a. 11 Aff. 29. 11 E. 3. Estoppel 228. 10 E. 4. 12. a. And the reporter [45] (as it seems) says, he has read, that one Henry had for his surname, *In the Hall*, and brought a writ by this name, which consisted of three English words, and well; for his name is not *Henricus in Aula*. and cites 29 E. 3. 2. a. so that *brevia tam originalia quam judicialia patiuntur Anglica nomina*.

3. Where there is no Latin word obvious, to signify the thing for which the action is brought, an Anglice will serve; as where it is for a tester of a bed, there *fulcrum lecti* with an Anglice well enough. But where an obvious word occurs, there, because by the statute of 36 E. 3. all pleas ought to be inrolled in Latin, an Anglice will not serve, lest the divine science of the law should be profaned by barbarisms. Jenk. 270. pl. 88.

4. In an information for seditious words it was insisted by the counsel, and agreed by the Court, that the antient precedents, and

and many later also, were used to express the words in Latin, and this pursuant to the statute of *Ed. 3.* which requires, that their legal proceedings should be in Latin. *Vent. 325. Hill. 29 and 30 Car. 2. Harrington's Case.*

5. An action upon the *case was upon a promissory note*, and a demurrer for false Latin in the original, which was *locarent ad computum for locaret*, &c. for the plaintiff it was said, that false Latin, if immaterial, shall not abate a writ. Per Cur. in an action upon the case, the original sets out the whole matter so, as that the *original is as the bill*; and therefore, false Latin shall not vitiate it. But if it had been *in a writ*, for which there is an exact form in the register, then it would be bad. Judgment Respond' Ouster. 11 Mod. 237. Trin. 8 Annæ, B. R. Dillingham v. Gately.

6. 4 Geo. 2. 26. Enacts, that *all writs, process, pleadings, rules, indictments, records, &c. shall be in the English tongue only, &c.*

Latitat.

(A) Latitat. *What it is, and the Intent of it.*

1. THE original of this writ was, that in antient time, while the King's Bench was moveable, and following the King's Court, the custom was, upon commencing a suit, to send forth a writ to the sheriff of the county where the Court lay, for the calling him in, and if the sheriff returned, non est inventus in balliva mea, &c. then was there a second writ sued forth, that had these words, cum testatum est quod latitat, &c. and thereby the sheriff commanded to attach him in another place where he may be found. Now when the tribunal of the King's Bench came to be settled at Westminster, the former course of writ was held for a long time, first sending to the sheriff of Middlesex to summon the party, and if he could not be found there, then to apprehend him wheresoever; but afterwards, upon pretence of easing the subject, and expediting justice, it was contrived to put both these writs directed to the sheriff of the county where he is suspected to be. And by this writ, a man being brought in, is committed to the marshal of the King's Bench, in whose custody,

custody, when he is, he may be sued upon an action in that Court. Cowell's Interp. verbo Latitat.

2. It was said by the Court, that a latitat cannot issue out of this Court into the county of Middlesex; for if the Court removes out of Middlesex, then the process must be a latitat; and in the county where the Court is, the process must be by bill, as it was in Middlesex before the Court removed. 2 L. P. R. 147. cites Hill. 1656. B. S. Abbot v. Camby.

[46] 3. The time when a latitat issued forth is *traversable*, and may be averred otherwise than according to the teste; per Keeling Ch. J. which was agreed by the whole Court; for a relation shall not work a wrong. If a man be taken in the vacation by warrant without writ, and a latitat be procured tested in the term, the teste shall not discharge the wrong done after the teste, and before the actual taking out the writ, but the plaintiff may take issue that he prosecuted truly. 2 Keb. 190. pl. 125. Pasch. 19 Car. 2. B. R. Bilton v. Long & al.

4. Latitat is *only to bring the defendant in custodia, that the plaintiff may declare* against him by bill, and after that the proceedings upon the latitat cease. Vent. 28. Pasch. 21 Car. 2. B. R. Hanway v. Merry.

Show. 354.

S. C.—A

latitat may

be continued

7 years; per

Herne se-

condary.—Sid. 5.

in Case of Day v. Clinch.—S. P. Sid. 60.

Welden v. Gregg.—It is in the

nature of an original in the C. B. and so hath been always held to be; per Roll Ch. J. Sty. 156.

Mich. 1649. Coles v. Sibbye.

5. Latitat is the original of B. R. and may be continued on record as an original writ, and is sufficient to prevent the statute of limitations. Carth. 234. Pasch. 4 W. & M. B. R. in Case of Culliford v. Blandford.

Comb. 194.

Pasch. 4 W.

& M. B. R.

S. C.—

Carth. 132.

S. C. and P.

6. A latitat was never construed to be a commencement of a suit on a penal law, and the time must be reckoned from before the filing of the bill; per Holt Ch. J. but per 3 J. contra. Vid. Show. 354. Culliford v. Blandford.

7. Note, It is a general rule, that where a defendant appears voluntarily, it shall be of no force, unless the plaintiff sue out his latitat, or bill of Middlesex, within a fortnight. Comb. 244. Pasch. 6 W. 3. B. R. Anon.

8. In *assumpsit* the plaintiff produced a note, dated 18 Apr. 1724. for payment of 60 l. The defendant produced a receipt under the plaintiff's hand shewing that defendant was to have 6 weeks from the date of the note to pay this money; and therefore insisted that the plaintiff cannot maintain this action, because the process against the defendant bore teste 18 May, so that the 6 weeks were not yet expired. But it was answered, that the declaration was of Trinity-Term, which was above 6 weeks after the date of the note, and that is the only thing of which the Court ought to take notice; for the original process is only to bring the defendant in custodia *mareschalli*, which may well be before the cause of action. And the Court held that to be the constant difference; for the plaintiff may sue out a latitat before the cause of the action, but he can not declare

declare till after the cause of action arises. 8 Mod. 343. Hill.
11 Geo. Perry v. Kirk.—Nor can he arrest upon it before the
money is due. Vent. 28. Hanway v. Merry.

Law.

(A) *What is or may be said to be, or not to be* * Law. * See Maxims, sub tit, Law.—See Precedent.

1. *Constant allowance* in many cases doth make law. 2 Inst. 26.
399.—Jus venit, quod usus comprobavit. Ld. C. Ellesmere's Postnati, 35. cites it as said by Bracton.

2. What hath been *always used* and observed, is to be taken for law. Cro. 732. Mich. 41 & 42 Eliz. in Case of Forth v. Harrison.

3. A thing *received in the country as a law*, and without precedent or authority to the contrary, it seems is to be taken for law. See Nufance (F. 2) pl. 1.

4. We must not always conclude a thing not to be law, because 'tis inconvenient; but that for which there is *neither practical custom, judicial precedent, or act of parliament* to warrant it, may well be judged to be so. 2 Vent. 7. Hill. 21 & 22 Car. 2. C. B. in Case of Crow v. Ramsey. [47]

5. The *laws of all nations* are doubtless raised out of the ruins of the civil law, as all governments are sprung out of the ruins of the Roman empire; it must be owned that the principles of our law are borrowed from the civil law, and therefore grounded on the same reason in many things; per Holt Ch. J. 12 Mod. 482. Pasch. 13 W. 3. cites Just. Inst. lib. 4. tit. 5. de Lege, in Case of Lane v. Sir Robert Cotton.

(B) *Division of Law.*

1. **THE** Law consists of three parts, viz. 1. * *Common Law*. 2. *Statute Law*. 3. *Custom*. Statute law corrects, abridges, and explains the common law. Custom takes away the common law. But the common law corrects, allows, and disallows both statute law and custom. For if there be repugnancy in statute, or unreasonableness in custom, the common law disallows and rejects it; Pl. C. 242. b. 24. a.—* Common law expressed in our books and judicial records. Co. per

Litt. 344. a. per Coke Ch. J. 2 Brownl. 198. Trin. 10 Jac. C. B. in Case of
—S. P. Co. Rowles v. Mason——cites 8 Rep. Dr. Bonham's Case.

Litt. 11 c. b.
but the third

division into custom, is expressed there by *particular customs*, and gives for reason of adding the word (particular) because if it be the *general custom* of the realm it is *part of the common law*.—— Particular customs are to be proved. Ibid.——The customs must be *founded on reason, and used time out of mind*; and the construction and determination of them belongs to the judges of the realm. Co. Litt. 344. a.

2. There are *diverse laws within the realm of England*. Ap

See Prerogative.

1. *Lex coronæ*.

Ista lex est
ab omnibus

2. *Lex & consuetudo parliamenti*.

querenda, a multis ignorata, a paucis cognita. Co. Litt. 11. b.

Lex parliamenti is lex terræ, and if a question concerning it doth arise in a cause, of which the King's Bench has proper consueance, the *King's Bench may adjudge of it*, as the Spiritual Courts do of temporal judgment, as patents deeds, &c. For the consueance of the principal draws to it the consueance of the accessories and incidents. 12 Mod. 64. Trin. 6 W. & M. King and Queen v. Knowles——cites Dy. 60.

And this holds in case of *privilege* of parliament, as in Sir GEORGE BENYON'S Case. Trin. 14 Car. 2. C. B. where *filing an original* against a sitting member, was adjudged no breach of privilege. 12 Mod. 64. King and Queen v. Knowles.

So a writ of error in *parliament*, if a term intervenes after the teste and before the return, hath been adjudged to be no *superseas* of execution. 12 Mod. 64. King and Queen v. Knowles.

So on a *habeas corpus*, the King's Bench hath determined *what continuance a commitment by parliament shall have*. 12 Mod. 64. King and Queen v. Knowles.

That can be no law or custom of parliament, which is not *grounded on precedents*; and there is none that ever any man's inheritance was determined per legem & consuetudinem parliamenti. 12 Mod. 64. King and Queen v. Knowles.

The law of
nature is

3. *Lex naturæ*.

that which God, at the time of the creation of the nature of man, infused into his heart for his preservation and direction, and this is *lex æterna*, the moral law, called also the law of nature; and by this law, written with the finger of God in the heart of man, were the people of God a long time governed before that law was written by Moses, who was the first reporter or writer of law in the world. 7 Rep. 12. b. Trin. Jac. Calvin's Case.

The common law

4. *Lex communis Angliæ*, the common law of England, sometimes called *lex terræ*.

has no controller in any

part of it but the High Court of Parliament, and if it be not abrogated or altered by parliament it still remains. Co. Litt. 115. b.——The common law is *the absolute perfection of reason*. 2 Inst.

[48] 179.—It is a *dangerous thing to alter* or shake any of the fundamental rules of the common law, which in truth are *the main pillars* and supporters of *the fabrick* of the common wealth. 2 Inst. 74. —S. P. 210.——The common laws are aptly and properly called the laws of England; because they are appropriated to this kingdom, as most apt and fit for the government thereof, and have no dependance upon any foreign law whatsoever, no not even upon the civil or common [canon] law, other than in cases allowed by the laws of England; so as the [common] law of England is *proprium quarto modo to the kingdom of England*. 2 Inst. 98.

The common law of England is *grounded on the law of God, and extends itself to the original law of nature, and the universal law of nations*. When it *respects the church*, it is called *lex ecclesiæ Anglicanæ*, as Magna Charta, cap. 1. *Ecclesia Anglicana habeat omnia sua jura integra & illæsa*. When it *respects the crown* and the King, it is sometimes called *lex coronæ*, as in stat. 25 E. 3. cap. 1. *Lex coronæ Angliæ est & semper fuit, &c.* and sometimes *lex regia*, as in Registro, fol. 61. *Ad jura regia spectat; and, ad conservationem jurium coronæ nostræ, and ad jura regia ne decipiant, &c.* When it *respects the common subjects*, it is called *lex terræ*; as in Magna Charta, cap. 29. *Nisi per legale iudicium parium vel per legem terræ*. Yet in all these cases it is comprehended under this general term, the common laws of England. Ld. C. Ellesmere's Postnati, 32, 33.

It standeth upon two main pillars and principal parts, by which it is to be learned or known. 1. Certain known principles and *maxims and ancient customs*, against which there never hath been,

nor

nor ought to be any dispute. 2. Where no such principles are, then, *former judgments given in like cases.* Ld. C. Ellesmere's *Postnati*, 35, 36

And Ld. Ch. J. Hale says, the formal constituent parts, as he may call them, of the common law, seem to be principally these 3, viz. 1. The *common usage* or custom and practice of this kingdom. 2. The authority of [*acts of*] *parliament*, introducing such laws. And 3. The *judicial decisions* of Courts of justice, *consonant to one another*, in the series and successions of time. That it is this usage which gives power sometimes to the canon law, as in the Ecclesiastical Courts; sometimes to the civil law, as in the Admiralty Courts; and again controlls both when they cross other customs generally received. That what we now take for common law were undoubtedly acts of parliament, though not now to be found of record, they being perished and lost. That as to judicial decisions, it is true that though they bind the parties as a law as to the particular case in question till reversed by error or attain, yet they have great weight and authority, especially when consonant with those of former times. Hale's *Hist. of Common Law*, 65, 66, 67.

Copyholds, and all other parts of the common law, were at first established by act of parliament till the records of them came to be lost; per Ld. Macclesfield. Trin. 1721. Ch. Prec. 574. in Case of Sir H. Peachy v. D. of Somerset.

For more of this division of the law, called the common law, see Hale's *Hist. of the Common Law*, cap. 1, 2, 3, 4.

5. *Statute law*, viz. laws established by acts of parliament.

6. *Consuetudines*, customs reasonable.

No law or custom of

England can be taken away, abrogated or annulled, but by authority of parliament only. 2 Inst. 97. 619.

7. *Jus belli*, the law of arms, war and chivalry. In re-
publica maxime conservanda sunt jura belli.

8. *Law ecclesiastical or canon*, in Courts in certain cases.

Which is likewise

called *Law Spiritual*, and such are allowed by the laws of this realm, as are not against the common law, (whereof the King's prerogative is a principal part) nor the statutes and customs of the realm; and regularly, according to such ecclesiastical laws, the ordinary and other ecclesiastical judges do proceed in causes within their consue. And this jurisdiction was so bounded by the ancient common laws of the realm, and so declared by act of parliament. Co. Litt. 344. a. And see Hale's *Hist. of the Law*, 27, &c. and *Ibid.* 71.

25 H. 8. cap. 19. §. 2. *Prohibits the executing any canons repugnant to the King's prerogative, or to the customs, laws, or statutes of this realm.*

Provided that all canons, constitutions, ordinances and synodals provincial, not repugnant to the King's prerogative, nor to the customs, laws, or statutes of this kingdom, shall be still used and executed, notwithstanding this act.

It appears by the words (*ad laudendum dignitatem Regis*), and (*in præjudicium Domini Regis & coronæ suæ*), in the statute W. 2. cap. 43. that *incroachment of jurisdiction* by Ecclesiastical Judges contrary to the King's laws is *crimen læsæ majestatis*. 2 Inst. 466.

9. *Law civil* in certain cases, not only in Ecclesiastical Courts, but in the Courts of the Constable, Marshal, and Admiralty; in which Court of Admiralty is observed the law of Oleron in the 5 R. 1. and so called, because it was published in the isle of Oleron.

10. *Lex forestæ*.

The laws of the forest are

general, because they respect all forests alike; they are likewise particular, because they relate to forests, and to no other places. They consist principally in three things, viz. In the preservation and continuance of the place to be a forest; in the preservation of the vert, which are the green woods and coverts there; and in the preservation of the venison, which is every beast of the forest and chase, that being a general word for all; and there can be no trespass committed in the forest, but it must be in one of these particulars. Manw. Forest Law 205. [49]

11. The law of *marque and reprisal*.

Vid. Prerogative. (N. 2)
A merchant alien who is here

12. *Lex mercatoria*.

here by safe conduct, is *not bound to sue according to the law of the land*, to wait the trial of twelve men, and other solemnities of the law of the land, *but ought to sue here, and shall be determined according to the law of nature in the Chancery, and ought to sue there de bora in bora, and de die in diem*, for the speed of merchants, &c. per the Ld. Chancellor; and he said further, that merchants, &c. shall *not be bound by our statutes, which are introductive of a new law*, but [where] they are declarative of the old law, viz. the law of nature; and though by their coming here, the King can compel them to stand to the right, yet it shall be *secundum legem naturæ*, which is by some called Law-Merchant, which is the universal law throughout the world. 13 E. 4. 9. b. 10. a.—Br. Be-pizen, pl. 5. is a very short note of this.

The law of merchants is a branch of the law of nations; and merchants are favoured in our law, as necessary for the public weale, and as they employ all other trades, and transport their wares into other countries. Arg. Palm. 4, 5. in Case of the King v. Cusack & al.—2 Roll R. 114. S. C. Arg. says, it is impossible that the municipal laws of any kingdom should be sufficient for ordering the affairs and traffick of merchants, and therefore the generality of this law has obtained the name of Law-Merchant in our books; and of this law there are several positive and general rules. 1. That merchants ought not to be hindered or delayed, but ought to have the speediest dispatch that may be. 2. That *all merchants coming to the staple, shall be ordered by law-merchant, and not by the law of the land. 3. If the goods and merchandises of our merchants are seized by any other nation, and spoiled or wasted by them, we may seize all the goods of their merchants here, till satisfaction made, and of this there is a notable record in 3 E. 1. Mem. 19. which says, that it is *secundum legem mercatorum & consuetudinem regni*, to which Montague Ch. J. agreed, saying, it is true, and is like to the taking goods in Withernam till restitution of the goods be made to be replevied.—* 27 E. 3. Stat. 2. cap. 2. Statute Staple.

If alien merchants sue for a debt in Chancery, they are to be treated according to the law of merchants and of nature. Jenk. 164, 165. pl. 16.

The judges ought to take notice of that which is used among merchants, for the maintenance of traffick. Yelv. 136. Mich. 6 Jac. B. R. in Case of Pierson v. Pounteys.—Brownl. 102. S. C. S. P. And it is part of the common law of this kingdom, and if any doubt arise to the judges about their custom, they may send for the merchants to know their custom; per Hobart Ch. J. Winch. 14 Mich. 19 Jac. in Case of Vanheath v. Turner.

The law of merchants is *jus gentium*, and the judges are bound to take notice of it; per 3 J. Show. 318. Mich. 3 W. & M. B. R. in Case of Mogadara v. Holt.—Though the Court is to take notice of the law of merchants; yet they cannot take notice of the custom of particular places. Resolved 1 Salk. 125. Pasch. 3 W. & M. B. R. in Cases of Hodges v. Steward.—Ibid. 443. Mich. 4 W. & M. B. R. in LETHULIER's Case, it was said by Holt Ch. J. That we take notice of the laws of merchants that are general, but not of those that are particular usages.

See Prynne's
Animadver-
sions 201 to

13. The laws and customs of the isles of Jersey, Guernsey, and Man.

208. cap. 69, 70.—See 4 Inst. 283. cap. 69. of the isle of Man, and of the law and jurisdiction of the same, and 286. cap. 70. of the law and jurisdiction of Jersey and Guernsey. And see Guernsey, &c. supra.

It is called
Stannaria

14. The law and privilege of the Stannaries.

from Stannum, because the Lord Warden hath jurisdiction of all the tyane in Cornwall and Devon. Vid. 4 Inst. 229, &c. cap. 45. of the Courts of the Stannaries.

15. The laws of the East, West, and Middle Marches, which are now abrogated. Co. Litt. 11. b.

3. Something might here be said of the feudal law. As to the time of the original institution of feuds, there seems to be great uncertainty, authors differing very much therein. Some ascribe it to the time of Constantine the Great, and that he was the first institutor of them; others, as Sir H. Spelman, in his Glossary verbo Feodum 216. takes notice, that some ascribe it to the Gauls or Franks, others to the Lombards, and others to the Germans: however, the same author says, that feodorum inventum peperit rei militaris necessitas; and ibid. 217. that it may be said of the feudal law, as of other unwritten laws, temporis

poris eam esse filiam, sensimque succrescentem, edictis principum auctam indies & exultam. And says, that what our lawyers call copyholds, and which they speak of, as held at the will of the lord by copy of Court-Roll, explains to us the ancient nature of feuds. And again, as to its being introduced hither, he [50] says, page 218. That feodorum servitutes in Britanniam nostram primus invexit Gulielmus Senior, Conquestor nuncupatus, qui lege ea e Normannia traducta Angliam totam suis divisit commilitibus. And afterwards, that *mos in conferendis feudis solennis fuit, non repentinus, non temerarius*—And ibid. pag. 216. says, that feodorum nostrorum origo & antiqua scientia e jure feudali (*jurisconsultis nostris nimium incognito*) expetenda sunt. My Ld. Coke, in his otherwise very learned Commentaries on the Tenures of Littleton, has said so very little of it, (though the subject matter of the book led him directly to it, as the source of what he so largely otherwise expatiated upon, and whence he might have cleared many obscurities), that it seems even that great man had (as Sir H. Spelman above complains) consulted it very little. But the late Ld. Ch. B. Gilbert, who drew deep in that so much neglected fountain, has manifested the great use of that law, in explaining those ancient tenures, and the manner of transferring estates in those ancient times, and thereby illustrated many of the parts thereof, not thoroughly understood before, and so opened a way for a clearer apprehension of the very reasons of those tenures, and of the manner of transferring them; and it would be high injustice to the memory of that great benefactor to the law, not to acknowledge the obligations the students thereof are under to him. And the like may be said of another reverend person now living, the author of the Introduction to the Laws of Tenures. To which I shall only add what my Ld. Coke in his Littleton 183. b. tells us, that *scire proprie est rem ratione & per causam cognoscere*.

4. The common law takes conuſance of the law of the constable and marshal; for in appeal of death it is a good justification, that the deceased appealed him of treason before the constable and marshal, by which they combated there, and the defendant vanquished the deceased to death; and this is a good justification at the common law; per Needham J. And Ashton and Moyle agreed that the common law will take notice of the law of constable and marshal; nevertheless Prisot contrary. But after they three had said as above, Prisot did not deny it. And the common law will take conuſance of the ecclesiastical law. Br. Trespass, pl. 197. cites 37 H. 6. 2. 3.

Br. Action sur le Statute, pl. 18. cites 37 H. 6. 20. — Br. Jurisdiction, pl. 103. cites 37 H. 6. 21. — The martial law is not a fixed, but a transitory law, variable by the general, as occasion and circumstances require, according to the articles of war; per Holt Ch. J. 6 Mod. 180. Trin. 3 Annæ B. R. Anon.

5. There is no law or precedent obligatory to the sovereign Court of one country to put in execution the sentence of any Court in another country. For *par in parem non habet imperium*. And such proceedings in another country shall not be called *res judicata*,

dicata, nor prevent a new inquiry against a person and his goods under the direction and protection of the laws of the country. MS. Tab. tit. Jurisdiction, cites 30 Aug. 1715. Goddard v. Swinton.

(C) Law Common, Canon, Civil, and Statute, and which shall be preferred.

1. **WHERE** the *common law and statute law concur*, the common law shall be preferred. 4 Rep. 71. Trin. 33 Eliz. C. B. Hynde's Case.—Per Foster J. Raym. 7.—Co. Litt. 49.—Pl. C. 59.

2. Before the 21 H. 8. of *Pluralities*, the common law was guided in this point by the canon law. Arg. Mo. 436. Hill. 38 Eliz.

[51] 3. Common law takes notice of the civil law in the Court of Admiralty, Court of Constable and Marshal; and of the law between merchants; and of the canon law in Courts Ecclesiastical. And if any *case happens at common law for which there is no precedent*, common law shall judge according to the law of nature and the public good. Jenk. 117. pl. 33.—Ibid. 97. pl. 88. cites 8 E. 4. 12. 3 H. 6. 2. Hob. 11. Br. Cases, 481.

6 Mod. 190.

—There is but one canon law throughout

the whole church; per Whitlock J. And Doderidge J. said, that the law of the English church is not the law of the Pope, but is *all extracted from the ancient canons, as well general as national*. Lat. 234.—See Dav. 69. b. &c. in Case of the Commenda.

4. Canon law is not admitted here, but as far as it has been received from time immemorial; per Holt Ch. J. Salk. 299. Mich. 10 W. 3. B. R. the King v. Raynes.

5. The act of 17 Car. 2. 3. of union of churches, shall be construed by the canon law. 8 Mod. 5. Mich. 7 Geo. the King v. Archbishop of Armagh.

6. The civil law, and not the canon law is the rule for construing the *Statute of Distributions*, as to the computing the *degrees of proximity*; per Master of the Rolls. Tr. 1722. Ch. Prec. 593. Mentney v. Petty.

7. The *canon law* is the original ground of the privilege of the clergy, and is so far in force as received in England. 2 Hawk. Pl. C. 337. cap. 33. f. 2.

(A) Lawful

(A) Lawful Prize.

1. **A** Merchant ship was taken by a Spaniard *enemy*, and a month after an English merchant with another ship *re-takes* it from the Spaniard. The ship being gained by battle of an enemy, neither the King nor the admiral, nor the parties to whom the property was before, shall have it, and a prohibition granted. 2 Brownl. 11. WESTON'S Case, cites 7 Ed. 4. 14. 2 & 3 P. & M. D. 128. b.—Unless they claim it the day in which it was retaken, *ante occasum solis*. Jenk. 201. pl. 22.

2. Where goods of any subject of a *foreign prince in amity* with our King, are taken by an *enemy of that prince*, and those goods *come to the hands of the English*, they cannot be regained from the English; for they were taken *jure belli*. Jenk. 201. pl. 22.

3. If a ship be taken by *piracy*, or if by *letters of mart*, and be not brought *infra præsidia* of that king by whose subject it was taken, it is no lawful prize; and the property is not altered, and a sale in such case is void. Mar. 110. Trin. 17 Car. Anon.

4. Where the question is prize or not prize, no *prohibition* shall go. Sid. 320. Hill. 18 & 19 Car. 2. B. R. Thompson v. Smith.

5. A justification of the taking a prize as *captain of a man of war*, and condemnation in the Admiralty Court, is not sufficient. Show. 6. Pasch. 1 W. & M. Beake v. Tyrrel.—But must shew some special cause for which she became prize, and what Judge gave sentence, and to whom such Court of Admiralty did belong. Carth. 31 S. C.—3 Mod. 194. S. C.

Length of Time.

[52]

(A) Length of Time. How it shall affect.

1. **I**NJUNCTION was granted to stay suit on an *old sleeping deed* of annuity which was newly started up after 40 years. Annuities.
VOL. XV. F 12 Car.

12 Car. 1. 1 Chan. Rep. 108. Southcot v. Southcot.—Ibid. 144.
15 Car. 1. Bales v. Proctor S. P.

2. Annuity during the life of A. and B. A. dies, B. makes *no claim* in 40 years, the Court conceived it as a trust, and decreed the estate to be discharged. 33 Car. 2. 2 Chan. Rep. 219. Bonington v. Walthall.

Awards.

3. Two *joint executors* submitted disputes about the testator's estate to arbitrators, who made an award; about 12 years after one of the executors dies; the surviving executor to whom an account was awarded to be made by the other, having made *no demand in all that time*; yet the award was decreed to be performed by the executor of the co-executor. Trin. 30 Car. 2. Fin. R. 384. Sweet v. Hole.

Bankrupt.

4. It was said by Mr. Fazakerley, that it never was determined, that an *act of bankruptcy* could be *waved or purged*. See Sel. Chan. Cases in Ld. Talbot's time, 243, 244. Mich. 1734. De Gols v. Ward.

Bonds.

5. Bond to pay 30*l.* at 9 days end was never sued for till 22 years after, though the *defendant* was always *necessitous* and a prisoner, and the *plaintiff* a man of worth; the Court conceived the said money to be satisfied, it not being demanded in 22 years, and decreed the bond to be delivered up to be cancelled. 10 Car. 1. Chan. Rep. 78. Coles v. Emerton.—And 10 Car. 1. Ibid. S. P. Carpenter v. Tucker.

6. A bond of 300*l.* penalty without condition entered into by the plaintiff to the defendant, to save the defendant *harmless* against a bond of 200*l.* The said bond being 23 years old, and not sued in that time, was decreed to be delivered up to be *cancelled*. 10 Car. 1. 1 Chan. Rep. 88. Geoffry v. Thorn.

7. *Judgment on bond* of 40 years standing being *kept off by prior incumbrances*, and the debt being *owned by answer* to a bill for discovery, was ordered to be paid. 26 Car. 2. 2 Chan. Rep. 102. Winchcomb v. Winchcomb.

Ch. Prec.

310. Hill.

1710. S. C.

—N. B. In

this case

8. 49 Years is not time sufficient to *ground presumption of payment* of a bond upon in equity. Per Ld. Cooper 3 Ch. R. 101. Crosby v. Middleton.

there had been an agreement within 10 years before, to give fresh security by the surety who had signed and sealed the bond, but his name was not inserted in it, but which he was ignorant of; and the principal obligor and obligee being traders had dealings all that time, and then the principal obligor broke. Ibid.

S. P. 6 Mod.
22.

9. Where a bond for payment of money has lain *dormant* 20 years, if on an action brought thereon, the *defendant pleads solvit ad diem*, Holt Ch. J. said, this will be a good plea, &c. For it is a strong presumption, the bond has been satisfied, where there has been no demand made, nor action brought thereon, in so long a time. 11 Mod. 2. Pasch. 1702. B. R. Anon.

Decree.

10. Decree for settling differences was denied to be reversed after 16 years, though there might be error to ground a bill of review. See Chan. Rep. 139. 15 Car. 1. Goddard v. Goddard.

11. A cause

11. A *cause* was heard after 30 years, the inrolment of the decree being lost. 3 Ch. R. 27. 20 Car. 2. Devering v. Cooper.

12. Bill of review of a *decree* upon an agreement between *baron and feme*, whereby the feme without any *fine* settled an annuity out of her own lands on the baron for his life, and the baron quitted some advantage he had on settlements made, and gave her power to dispose by will, was dismissed because the decree was and is good, and because of the length of time since it was made, and that the plaintiffs rested under it without any complaint. 2 Ch. R. 46. 22 Car. 2. E. of Castlehaven v. Underhill.

13. An executor brought a *sci. fa. to revive* a decree obtained about 23 years since. The defendant pleaded in bar, that after this decree, the plaintiff's testator lived in the same town with defendant 15 years, and never asked him for the money, but had told him that he should never be troubled for it, and acquitted him thereof, but suggested no deed or writing for that purpose. The defendant likewise pleaded to the plaintiff's not shewing a sufficient probate of the will to the intitling himself. Ld. C. Macclesfield ordered that the plaintiff should not proceed without shewing the defendant a sufficient probate of the will, and without farther leave of the Court, in respect of the staleness of the demand. Mich. 1721. Wms's Rep. 766. Comber's Case.

14. Where a devisee had admitted a title in the heir, and had paid rent, and agreed so to do, and this for 20 years, 'twas decreed against the devisee, he not coming in time. 3 Ch. R. 4. Mich. 13 Car. 2. Davie v. Beversham.

Devisees.
N. Ch. R.
76. S. C.

15. A copyhold was enjoyed as under a will made 40 years ago, and upon a writ of *aiel* being brought by the heir in the Court Baron, the devisee brought his bill and insisted on his long possession. The defendant pleaded *infancy and coverture*, viz. That she was but three years old at her father's death, whose heir she is, and since a feme covert, and therefore laches cannot be imputed to her, and did not discover her title but lately, being heir to her grandfather the testator; and it was insisted that a writ of *aiel* by the *stat. 31 H. 8.* may be brought upon a *seisin by the ancestor within 50 years.* The defendant likewise denied the will and suggested insanity in the testator, and that there was not any surrender to the use of the will. The surrender was not proved but decreed; and the defendant might go to law to try will or no will; per North K. 2 Chan. Cases 150. Mich. 35 Car. 2. Lyford v. Coward.

Vern. 196.
S. C.

16. Legacy was presumed to be paid after a great length of time, and decreed a perpetual injunction against a bond given relating to it, about 30 years since, and discharged a former decree, though inrolled. 2 Vern. 21. Pasch. 1687. Fotherby v. Hartridge.

17. After a long enjoyment by a purchaser, a descendent of the vendor's pretends an *entail*, but decreed that if such descendent should

Entails.

should not within a year ensuing evict the plaintiff on such pretended entail, then all the writings, which he is now decreed to bring in upon oath, shall be delivered up to the plaintiff, and a perpetual injunction to quiet the possession against the descendant and his heirs, and all claiming by, from or under him or them &c. 1 in. R. 320. Mich. 29 Car. 2: Fleming v. Page.

Error.

18. *Writ of error returnable in parliament*, by reason of the distance of the day of the return, will be no *superfedeas*. Vent. 31. Pasch. 21 Car. 2. B. R. Wortley v. Holt.

Frauds.

19. Suit was to avoid a *conveyance* by fine and deed to lead the uses of the fine 23 years since on supposition of *fraud* by purchasing the fee of the land for 11 l. worth 60 l. per ann. the plaintiff being ignorant of the value, but defendant well apprised thereof, and the plaintiff ignorant also of his title, which he came to the notice of after the fine, bill was dismissed. 2 Chan. Cases 159. Hill. 35 & 36 Car. 2. Hobert v. Hobert.

[54]

20. The Court refused to *set aside an account, stated in a fraudulent manner*, after the death of the parties to the account, and near 20 years after the stating it. Sel. Chan. Cases in Lord King's time 34. Western v. Cartwright.

21. *No length of time will bar a fraud*. Per Lord Chancellor. Hill. 1734. Sel. Chan. Cases in Lord Talbot's time 63. in Case of Cotterell v. Purchase.

Heirs.

22. It seems that the continued possession of the bastard issue shall prevail in conscience against the right of the mulier puisne. Cary's Rep. 6. cites Doctor and Stud. 154.

Judgments.

23. After a *judgment* had been of a long standing a sci. fa. was brought upon it against the heir of the heir; it was assigned for error that *there was no bill upon the file*; but it being an ancient judgment, and it being mentioned by a note in the attorney's book, that such a judgment was paid for to be put upon the file; it was ordered that a new bill be put upon the file. Cro. J. 186. Mich. 5 Jac. B. R. Maynay v. Collins.

24. No relief on a judgment entered into 60 years since, especially since *no consideration* is proved. 2 Chan. Rep. 49. 22 Car. 2. White v. Ewens.

25. On a bill to *redeem* an estate actually *extended* on a judgment so long since as 6 Eliz. and gone through 5 or 6 hands, the question was, if defendant shall *account* otherwise than at the extended value; the cause went off on a proposition that defendant should be allowed what he paid, and account only for what he received during his own time; Jeffries C. Vern. 468. Tr. 1687. Poole v. Guise.

26. Conusor of a judgment *extends the lands* of the conusor on an *elegit*; conusor grants over the reversion to C.—C. may redeem though the conusor had brought a bill, and was dismissed 20 years before for the same purpose; for per Jeffries C. the *conusor* has at law an interest only *quousque*; and the dismissal here would not give him a greater estate, and it would be absurd

lard to deny a redemption; for the interest under the extent was but a chattle interest, and the consequence of denying a redemption would be, that lands of inheritance should not descend, but to the world's end go in a course of administration. Vern. 397. Pasch. 1689. Clobery v. Simonds.

27. Mean profits were decreed notwithstanding the length of time, and decreed *from such time as the right accrued*. 2 Chan. Rep. 261. 34 Car. 2. Coventry v. Hall. (Thinne's Case.) 2 Chan. Cases 71. Mich. 33 Car. 2. Coventry v. Thinne. The length of time was answered by the many *suits and abatements*.

Mean Profits.

28. Chancery will not relieve mortgages after a long lapse of time, but it *being proved* by one witness, *that the mortgagee, about 24 years since, told him that he was fully satisfied*, and paid all his debts due from the mortgagor, the Court, in respect of the *badges of equity* which this cause beareth, proposed to do something for the plaintiff which the defendant consented to do. Chan. Rep. 127. 15 Car. 1. Isham v. Cole.

Mortgages.

29. *Redemption* of a mortgage was decreed to the heir after forfeiture and sale for a long time past by reason of the impediment during the *coverture of the mother*. Chan. Rep. 193. 12 Car. 2. Cornel v. Sykes.

So after 4 descents in case of infancy and coverture. 2 Vern.

377. Proctor v. Cowper.—In this case mortgagee entered in 1650, but made up an account in 1686, when a bill was brought, and the decree was Trin. 1700.

30. Lord Keeper Bridgman said he would have a rule to limit to *what a time a mortgage should be redeemable*, and conceived 20 years a fit time in imitation of the statute of limitations in real actions; but gave no rule in it then, only he directed that when a bill came to redeem an old mortgage, the defendant should plead or demur to it that so the judgment of the Court might be had upon it. Chan. Cases 102. 29 Car. 2. Pearson v. Pully.

S. P. unless there are such particular circumstances as may vary the ordinary case; as infants, feme covert, &c. are provided for by the

very statute, though those matters in equity are to be governed by the course of the Court. 2 Vent. 340. Tr. 22 Car. 2. White v. Ewer.—Chan. Rep. 105. 12 Car. 1. Hales v. Hales. S. P. — Ibid. 206. 13 Car. 2. Clapham v. Bowyer.—Chan. Rep. 184. 12 Car. 2. Sanders v. Hord, acc. S. P. per Lord King, and though the plaintiff was an *infant part of the time*, yet the right to redeem not beginning in his time, and 12 years being lapsed since his full age before he brought his bill, it was dismissed. G. Equ. R. 185. Hill. 12 Geo. 1. Floyd v. Mansell.—S. P. Decreed, and though the plaintiff was an infant at his father's death, yet the computation of time began 33 years before, even in his grandfather's time, and run on in his father's time who was of full age, and therefore will run on *against infants after*. Mich. 1729. Abr. Equ. Cases 315. Knowles v. Spence.—It was admitted arg. that the general rule is not to exceed 20 years, unless it be upon extraordinary circumstances. Sel. Chan. Cases in Lord Talbot's time 62.—If a person takes a conveyance of an estate as a mortgage without any defeasance, he is guilty of a fraud, and no length of time will bar a fraud; per Ld. Chancellor. Sel. Chan. Cases in Ld. Talbot's time 61. Hill. 1734. in Case of Cotterell v. Purchase.—Where a bill to redeem was brought in about 16 years after entry of the mortgagee, but the cause lay dormant till after 20 years, this is no like making an entry and then lying still; for the defendant might have dismissed the bill for want of prosecution, or they themselves might set down the plea to be argued; per Lord Chancellor. Sel. Chan. Cases in Lord Talbot's time. 63. Ibid.

[55]

31. After a long time and a *release of the mortgagor's interest*

long since the Court would not admit a *redemption* of a mortgage, though the premisses were mortgaged for about a *5th part of their now value*. 2 Chan. Rep. 131. 29 Car. 2. Nance v. Coke.

S. P. 1
Chan. Cases
220. Hill.
23 & 24
Car. 2. Rol-
carrick v. Barton.—So at the suit of an executor, per Ld. K. Coventry. 13 Jac. 1. N. Ch. R. 34.
Gird v. Toogood.

32. A redemption of a mortgage *at the suit of other creditors* was denied, because of the length of time. 2 Chanc. Cases 62. Trin. 33 Car. 2. Arg. cites Sir Woolaston's Case.

33. If mortgagor agrees that mortgagee shall *enter and hold till satisfied* (which is in the nature of a *Welch mortgage*) the length of time is no objection. Vern. 418. Mich. 1686. Orde v. Heming.

34. After a mortgage had been made 24 years, the heir brought a bill to redeem; but he dying the suit was revived by his co-heirs, who about 9 years afterwards *got a decree but did not prosecute it*, but sold the equity of redemption to J. S. who brought his bill to redeem, and to have the benefit of the former decree; Lord Wright dismissed the bill because of the difficulty of the account after such length of time and because the mortgagor acquiesced so long, and neither paid the debt nor sought a redemption; and though there were *infants*, yet *the time having begun upon the ancestor*, it shall run upon infants as it is at law in the case of a fine, and though they had a decree, yet they did not prosecute it. 2 Vern. 418. Hill. 1700. St. John v. Turner.

Non Compos.
35. The Court declared that after 20 years and two purchases, it was not proper to *examine a non compos mentis*, and dismissed the bill. Chan. Rep. 40. 5 Car. 1. Winchcomb v. Hall.

Piscary.
36. In regard the plaintiff had 40 years *possession* of a *piscary*, the Court decreed defendants to surrender and released their title to the same though the *surrender* made by the defendant's ancestor was *defective*, and that the plaintiffs should hold and enjoy against the defendants. Vern. 196. Mich. 1683. in Case of Lyford v. Coward.—Cites 35 Car. 2. Pencose v. Trelawny.

Possession.
37. Possession for *more than 70 years under a legal title* shall never be disturbed in equity. MS. Tab. tit. Injunction, cites 28 Jan. 1722. Stone v. Burn.

Purchaser.
38. *Payment* of purchase will be money presumed after 40 years. Chan. Rep. 94. 11 Car. 1. Bidlake v. Arundell.

39. *Purchaser* for a valuable consideration was not relieved against an *old dormant entail*, it being found by verdict not to be fraudulent, but no costs to the defendant. Clarendon C. N. Ch. R. 57. 13 Car. 2. Needler v. Wright.

Fin. R. 34.
Paich. 30
Car. 2.
40. Bill was for *remainder of purchase money* after 33 years, and no suit for it before but the land was enjoyed, and former parties

parties concerned dead. No relief was granted. 2 Chan. Rep. 44. 22 Car. 2. Hunton v. Davis.

Heupert a
Hoopert v.
* Benn.—

So purchaser for a valuable consideration of lands charged with an annuity could not be relieved as to arrears due 30 years before, and though the same had not been demanded in all that time. Fin. R. 252. Trin. 28 Car. 2. Duke of Albemarle v. Viscountess of Purbeck.

41. In cases of *not taking the sacrament*, or the *oaths* of allegiance and supremacy, the Court will *intend* that they were *duly taken* after a long acquiescence, but a right shall never be intended when the merits of it are controverted, and no collateral part disputed. 8 Mod. 166. Arg. Trin. 9 Geo. in Case of the King v. Powell.

Qualificati-
ons by taking
oaths &c.

42. In an information in nature of a quo warranto, to shew cause why he claimed to be a capital burghess; per Cur. length of time will never *establisb* a right, which was gained by *usurpation*. 8 Mod. 165. Trin. 9 Geo. the King v. Powell.

Quo war-
ranto.

43. A statute entered into long since, and the conusee having held lands of the conusor divers years, the Court thought the debt satisfied and decreed it to be *vacated*. Chan. Rep. 106. 12 Car. 1. DENNIS v. NURSE.—So where the defendant insisted on a demand, and a promise of payment. Chan. R. 117. 13 Car. 1. HATTON v. JAY.—So after 46 years, and several descents and purchases of the lands appointed for payment of debts. Chan. R. 135. 15 Car. 1. Popham v. Desmond.—And though it was not extendable because of *infancy*, yet he should have sued in equity for relief. Lev. 198. Mich. 18 Car. 2. B. R. Middleton v. Shelly.

R. cogniz-
ance, sta-
tutes, &c.

44. An ancient recognizance *was denied to be set aside to let in a mortgage*. 2 Chan. Rep. 106. 27 Car. 2. Plummer v. Stamford.

45. A. seised of land confessed a statute to B. and afterwards another statute to C. and then made a lease in trust to D. to pay 40 l. a year to his wife for a *jointure*. - The heir got an assignment of C's statute which he set up against the jointure, whereupon the wife, to protect herself against the statute of C. procured an assignment of B's statute after a bill exhibited against her and pendente lite, and then set it forth in her answer. It appeared that this statute to B. was entered into in the 26 Eliz. which was 94 years ago (about the year 1583.) and the lease for jointure and payment of interest till 1644. was proved, and that then there was an agreement to forbear an extent till 1658. and that then there was a minority; and it was held by the Lord Chancellor that the antiquity of this statute was answered by the proving thereof and payment of interest. Chan. Cases 304. Mich. 29 Car. 2. Willoughby v. Perne.

46. Bill was for relief against a *statute 58 years old*; defendant to answer the length of time says, he found a writing containing an agreement not to execute it in the life of the cognisor, and that defendant did not dare to demand it, the plaintiff being a surety for money borrowed by defendant; but the statute was decreed

Trust.

to be vacated, and a perpetual injunction. Fin. R. 331. Mich. 29 Car. 2. Corey v. Corey.

47. Bill was to *discover a trust of lands*, after the same had been in possession of the defendant and his ancestors for 20 years, or more, without any claim, and suggesting that though several sums were paid to plaintiff's father as a consideration, yet it was only in trust to pay the same and other debts, and after to stand seised to his ancestor and his heirs. Decreed an account, and that on payment of what was due to defendant he should reconvey to plaintiff and his heirs. Fin. R. 262. Trin. 28 Car. 2. Berrington v. Mason.

48. Lands were *devised in trust* to pay debts and legacies, and then to the trustees and their heirs, on condition, that, *if any of the testator's name would buy them, he should have them for 200 l. less than the value*: 25 years after testator's death, one of the name brings a bill for præemption, but Jeffries C. dismissed the bill as unreasonable after so long time. Vern. 362, Hill. 1685. Hucksteep v. Matthewes and Court.

Vicaridges.

49. Length of time, as 160 years, *is not a sufficient re-uniting a vicaridge to a parsonage*, but that a new vicar may take wood, &c. of which the vicaridge was endowed. Cro. E. 873. Hill. 44 Eliz. C. B. Robinson v. Bedel.

[57]

Water-courses.

Affirmed by
Ld. Cowper.
Hill. 6 Ann.
G. Equ. R.
3. Ld.
Guernsey v.
Redbridges.

50. A *water-course* running to a house and garden, through another's land was enjoyed near 40 years. But it was objected by defendant to the length of enjoyment, that in 1662 A. took a lease of the lands, and during his lease made the water-course, and that after the lease expired, he was often denied liberty to scour or amend the water-course, and this was fully proved, and defendant insisted, it was only upon sufferance, and not on any agreement or consideration. Somers C. directed an issue, if any agreement between any owners of the respective estate, for the making or continuing it. On a rehearing Wright K. decreed for plaintiff, declaring a *quiet enjoyment* was the best evidence of right, and would presume an agreement, and the proof ought to come on the other side to shew the special licence, or that it was to be restrained or limited in point of time. 2 Vern. 390. Mich. 1700. Finch v. Redbridger.

51. A. had been in possession of a *water-course* upwards of 60 years. B. claimed the land through which the water-course ran, by virtue of a forfeited mortgage for 100 years, and which he had foreclosed. A's title was fully proved, and his bill was for quiet possession, and to have a perpetual injunction, B. having *interrupted him by cutting a channel through his own lands*, and setting up a sluice in the mouth of it, whereby A's water-course was totally diverted and prevented. It was objected, that it was a matter purely *at law*, and therefore he should have *established his title* there before he came here, and that the remainderman should be made a party; but decreed for A. the plaintiff,

plaintiff, and if the defendant would have had the *remainder-man a party*, he should have shewn in his answer who he was, and set forth that himself had only a term for years, and prayed that remainder-man might be made a party. Ch. Prec. 530. Trin. 1720. Bush v. Western.

52. A. seised of land in fee, made a *lease to B. for 90 years upon trust for such uses as A. should by his last will direct*. Afterwards A. made his will, (having then no issue, but his wife grossly enseint) and thereby *devised the same land to the heirs of his body, on the body of his wife begotten, and for default of such issue to the said B. and his heirs*. A. died, and a month after a son was born, who enjoyed the land 'till 21, and then suffered a common recovery, and afterwards devised the land to J. S. and died. J. S. exhibited a bill against B. to have the lease of 99 years assigned to him; and whether he should have it or not was the question?. And notwithstanding the long admittance of A's will; and the acquiescence under it for 20 years and upwards, B. was decreed to assign the residue of the said term, to whom J. S. should appoint, clear of all incumbrances, and the plaintiff his executors and administrators, to hold and enjoy the same. Fin. R. 160. Mich. 26 Car. 2. Nourse v. Yarworth.

Wills.
Vid. Heir
(L. 2.)

(A) Levant and Couchant.

1. **L**evant and Couchant shall be *intended such* beasts as are nourished and fed upon the land, and may there lie in summer and winter. 2 Brownl. 101. Mich. 9 Jac. C. B. Patrick v. Lowre. — *So many as the land will maintain*. Vent. 54. Hill. 21 & 22 Car. 2. B. R. in Case of Leech v. Widsley.

2. So many of the cattle as the land, to which the *common is appurtenant*, may maintain in the winter, so many shall be said levant and couchant; per Coke Ch. J. in Norfolk Circuit, and agreed to by 2 justices; cited Noy. 30. in the Case of Cole v. Foxman.—Goldsb. 117. S. P. in Case of Smith v. Bonfall.

3. *Prescription for common sans nombre*, without saying levant and couchant, being after a verdict was held good, but if it had been upon a demurrer, it would have been otherwise. 1 Mod. 7. Mich. 21 Car. 2. B. R. in the Case of the Corporation of Darby.—cited per Twisden J. as the Case of Masselden v. Stoneby.

[58]
Per Twis-
den. Vent.
165.

Vent. 165.
S. C. and P.

4. Levancy and couchancy need not be *averred*, where the copyholders have *solam & separalem pasturam*, which is different from their having common; for in this last case levancy and couchancy on their tenements is the measure of their common. 2 Lev. 2. Pasch. 23 Car. 2. B. R. Hopkins v. Robinson.

5. If a man has common for a *certain number* of cattle, belonging to a yard-land, &c. he need not say levant upon the yard-land, &c. but otherwise if it was a common *sans nombre*. 2 Mod. 185. Hill. 28 & 29 Car. 2. B. R. Stevens v. Austin.

6 Mod. 115.
S. P. Anon.

6. Foddering of cattle in the yard was held by Hale Ch. J. to be *evidence of* levancy and couchancy; per Holt Ch. J. 1 Salk. 169. Hill. 2 Annæ, B. R. Emerton v. Selby.

* Ley Gager.

Fol. 106.

* Ley Gager, *vadiare legem*, and there is also *facere legem*, by making of his law, that is, to take oath, (for example) that he sweeth not the debt de-

(A) Ley Gager. *In what Cases a Man shall be Ousted of the Law. By Matter of Record.*

[1.] If debt be brought upon recovery in Court † baron or franchise, which is not a Court of record, the law lies because it is not of record. 49 E. 3. 3. Contra 6 H. 4. pl. 3. adjudged.]
demanded of him upon a simple contract, nor any penny thereof. And it is called wager of law, because of ancient time he put in surety to make his law at such a day, and it is called making of his law, because the law doth give such a special benefit to the defendant to bar the plaintiff for ever in that case. Co. Litt. 294. b. 295. a. — S. P. 2 Inst. 45. — Every wager of law doth *countervail* a jury, for the defendant shall make his law, *de duodecima manu*, viz. an eleven and himself. And it should seem, that this making of law was *very ancient*; for one, writing of the ancient law of England, saith, *hujus purgationis non omnis evanuit vetustate memoria; nam per hæc tempora de pecunia postulatus debetur nonnunquam duodecima, quod aiunt, manu dissolvit.* 2 Inst. 45.

† S. P. Co. Litt. 195. a. — S. P. Le. 203. Pasch. 31 Eliz. Castle v. Oldman. — And Waller one of the secondaries shewed the Court a precedent, 6 Eliz. in debt, by TYNDAL v. TYLER, upon a *pain forfeited for breaking a by-law* in a Court Baron, and the party was received to wage his law. — Quære if it lies upon *amercement* in a Court Baron. Mo. 276. pl. 430. Pasch. 31 Eliz. Anon. — Cited 2 Vent. 171. — In debt upon *amercement* in a Court Baron, though the imposing of it was grounded upon a *prescription*, yet wager of law was admitted. Arg. cites Co. Ent. 118. But the Court over-ruled it. Vent. 261. in Case of the Mayor of London v. Dupester. — And Holt Ch. J. denied this Case of Co. Ent. 118. 2 Salk. 684. 2 March 1701. at Guild-hall. Mood als. Wood v. Mayor, &c. of London. — Holt Ch. J. cited the same point, as adjudged 29 Car. 2. Rot. 92. in B. R. which he said, was the only case or authority that he met with in the books, except the opinion of 49 E. 3. 3. which he said, he valued very little, as to what is said there of a Court Baron. But that what was said of a *franchise* might be so; for franchise *commonly means a Court of Record*. And he takes notice that was not said by the Court, but by the counsel. 12 Mod. 682. Hill. 13 W. 3. in Case of the City of London v. Wood.

[2. But

[2. But otherwise it is, if the recovery be in a Court of record. 19 H. 6. 80.]

If a man recovers damages in ancient demesne,

and the plaintiff brings debt, it shall be tried per pais, and the defendant shall not wage his law. Quere inde. Br. Ley Gager, pl. 11. cites 34 H. 6. 64.

[3. In debt defendant says, that he bought to the use of the King, [59] and the other says, that he bought to his own use; and after defendant may wage his law, though he has confessed the buying of record. 7 H. 4. 7.]

[4. In debt for arrearages upon judgment before auditors assigned of record, the law does not lie. 11 H. 4. 64. 92. 11 H. 4. 56. 4 H. 6. 17 b. 8 H. 6. 5 b. 29 b. 20 H. 6. 16 b. M. 41 & 42 El. B. R. adjudged Franklin's Case.]

Br. Ley Gager, pl. 31. cites 11 H. 4. 54.—S. P. Br. Ley Gager, pl.

35. cites 9 H. 5. 3. But that it is otherwise of an account before the plaintiff himself.

[5. But in debt upon arrearages of account before auditors assigned of record, the law lay at common law; for before the statute, the auditors had no power to commit to prison. 4 H. 6. 18. Contra 20 H. 6. 17. 14 H. 6. 24 b.]

Br. Ley Gager, pl. 24. S. P. cites 49 E. 3. 3. but Brook says, that it

is contrary at this day.——* W. 2. 11.——The defendant shall not wage his law, and this by construction of this statute, which gives them great authority. Co. Litt. 295. a.

[6. So, after the * statute, in debt for arrearages of account before one auditor assigned of record, the law lies; for this is at the common law, and not within the statute; for he cannot imprison by the statute. 20 H. 6. 16 b. adjudged. Dubitatur 4 H. 6. 25 b.]

* S. P. For the statute (W. 2. c. 11) says, coram auditoribus, and therefore of

an account before one auditor the law lies. Co. Litt. 295. a.—S. P. 10 Rep. 103. a. Mich. 10 Jac. in Denbawd's Case.—Br. Ley Gager, pl. 7. S. P. cites 20 H. 6. 16.

[7. So in debt for arrearages of account, found before auditors, not within the statute; as where defendant is found in surplus, there law lies; for it is at common law. 14 H. 6. 24 b. Curia. Contra 20 H. 6. 16 b. 17.]

But it was agreed, and said expressly, that in the Exchequer before

auditors, the lord was found in surplusage, and the bailiff brought debt upon the account, and the lord was ousted of his law by judgment; for that which is before auditors is of record, and shall bind the lord as well as the bailiff; and yet they may commit the bailiff to gaol if he be in arrears; but not the lord for his surplusage; for the statute does not extend to that. Br. Ley Gager, pl. 7. cites 20 H. 6. 16.—S. P. Co. Litt. 295. a.

[8. In debt for amercement in a leet, defendant shall not wage his law; because it is assessed in a Court of record. 10 H. 6. 7.]

Br. Ley Gager, pl. 90. cites S. C.

S. P. Co. Litt. 195. a.—S. C. cited Le. 203. Pasch. 31 Eliz. C. B. in Case of Castle v. Oldman.

[9. If a man recovers by verdict in action upon the case upon a promise under 40 s. in the Borough Court of Dunster in Somerset, which is not any Court of record, but a Court baron, and after brings action of debt in B. R. upon this judgment, yet the defendant may wage his law; because it is not any Court of record.]

This Case was denied by Holt Ch. J. 2 Salk. 684. in Case of Mood v. the Mayor,

acc. of London.

cord. Mich. 2 Car. between *Yewens* and *Pound* adjudged, and the law made accordingly.]

In an action of debt brought upon a contract the defendant cannot wage his law for part,

[10. In debt upon a contract of 40 s. if defendant confesses that he owes 20 s. to the plaintiff and is ready to pay it, he cannot wage his law of the remnant; because he has * acknowledged the contract of record; for it shall be intended, that the 20 s. is parcel of the 40 s. Contra 29 E. 3. 25 b.]

and confess the action for the other part; per Hobart Ch. J. said to have been adjudged, Mich. 15 Jac. in C. B. And it was said to have been so adjudged upon a shop-book in *TART'S CASE*, and cites 38 H. 6. 14. and adjudged accordingly. Godb. 327. pl. 420. Pasch. 21 Jac. C. B.

[60]

For though the parliament transferred the debt, yet it is not any

11. Where a debt is assigned by commissioners of bankrupts, yet ley gager lies against the assignee, though it was alleged, that it is quasi a debt on record, and the plaintiff enabled to the suit by act of parliament. Cro. C. 187. Pasch. 6 Car. B. R. *Morgan v. Green*.

debt of record, and as he might have waged his law against the bankrupt, so he may against the plaintiff. Cro. J. 105. Mich. 3 Jac. B. R. *Bradshaw v. —*.

And the Court took a distinction, that in the cases cited of the amercement by by-law, the debts are not immediately

12. In debt for *scavage*, being a duty accruing to the city for timber imported. The count was, that they were and had been a corporation, time out of mind, and their customs confirmed by act of parliament. The defendant tendered his law; but the Court over-ruled it; for here the duty itself is by prescription, and that confirmed by act of parliament. Vent. 261. Trin. 26 Car. 2. Mayor, &c. of London v. *Dupester*.

found upon customs, but upon the amercement by the by-laws, which are warranted by custom; but in the principal case, the debt is founded immediately upon the custom confirmed by act of parliament. 2 Lev. 106. S. C. by name of the Mayor, &c. of London v. Deputies.

But the reporter says, tamen quare; for he doubted how that would differ from the case at bar, only

13. Debt was brought for damages and costs recovered in a Court Baron in an action brought there for words. The defendant was not allowed to make her law. And it seemed clear, that though wager of law doth lie of a debt recovered in a Court Baron, yet that shall be intended of a debt originally sued for there. Raym. 386. Trin. 32 Car. 2. B. R. *Woodroffe v. Wilgrefs*.

that in the case at bar, wager of law would not have been in the original action, because there is an injury supposed in the defendant, in which cases wager of law lies not, cites Co. Litt. 295. and therefore though it be in a recovery in a Court Baron, yet because the original cause of the action would not permit ley gager, he thought they did well in refusing her waging of law. Ibid. 386, 387. — So where A. demanded a quit rent of 18d. a year of B. and B. promised payment, if A. would show his title, and satisfy him, that he had a right to demand it, and in an action upon this promise brought in a Court Baron A. recovered, though it was urged at the time of the verdict, that the freehold would come in question upon that promise, and so the Court Baron could have no jurisdiction. Upon debt brought in C. B. upon this judgment B. came to wage his law, and was ready to swear that he owed A. nothing; but the Court held, that by the recovery it became a debt and was owing; and being asked, if he had paid the money, he answered that he owed nothing; whereupon the Court concluded, that he had not paid it, and therefore would not admit his waging his law, without bringing sufficient compurgators, to swear, that they believed he swore truth, but such not appearing defendant defecit de lege, and judgment was given against him. 2 Mod. 140. Mich. 38 Car. 2. *Beaumont v. —*

14. Debt was brought in C. B. for a sum of money *recovered in the Hundred Court*, and the defendant was admitted to wage his law, though at first the Court doubted: 2 Vent. 171. Pasch. 2 W. & M. C. B. Anon.

And it is ridiculous to say, that wager of law will lie in debt upon a

judgment in a Court Baron, because the money might be paid in private; for that would be a reason to wage law in all the cases before put; but it is to be considered, that it is not the privacy of the payment, or the possibility thereof, that is the occasion of a wager of law; but that the ground of the action is secret; per Holt Ch. J. 12 Mod. 682. in Case of City of London v. Wood.

(B) In what Cases the Law shall be Ousted by Specialty. Vid. (K) pl. 4.

[1.] *N* debt upon arrearages of rent, reserved upon lease for years by deed, the law does not lie against the deed. 49 E. 3. 3. (It does not lie for the rent without the deed.)

[2. If my bailiff receives of me 20l. by deed, to buy things for the manor, and if it be found upon account, that he has bought nothing but retains the money in his hands; in debt upon the account the deed of the receipt shall oust him of the law. 49 E. 3. 3.]

[3. In writ of account, if defendant be adjudged to account, and before auditors he sets forth two tallies, testifying that the plaintiff had received certain monies, the plaintiff may wage his law, that those are not his tallies. 21 E. 3. 49.]

[61]

Fol. 107.

See (K) pl. 4.

4. By 38 E. 3. cap. 5. Any man may wage his law (by sufficient people of his condition) against Londoner's papers, and the creditor shall take surety otherwise, if he please; but shall not put the party to plead to the inquest, unless he will do so of his own accord.

But at this day, if the debtor subscribes his hand to the creditor's

book, he cannot wage his law; for their customs are approved by statute 14 E. 3. and other statutes; and this is not properly paper. Br. Ley Gager, pl. 98.—Debt upon a contract was brought before the mayor and recorder of London; the defendant tendered his law. The plaintiff replied, that there is a custom, that if a man has put a seal to a paper, testifying the contract, that he shall be ousted of the ley gager. The defendant demurred; for that the plaintiff by this plea had abated his own action. But adjudged before Prisot, that this matter will well maintain his count, and does not alter the nature of the contract; because it was an evidence only of the contract. D. 21. b. pl. 132. per Luke J. cites 30 H. 6.

5. A man retained an attorney for his master for 10 l. by the year by deed; the master, in debt by the attorney, may wage his law. Br. Ley Gager, pl. 95. cites 46 E. 3. 10.

But if the master makes the servant, who retained by deed, his

executor, and dies; there, in debt by the attorney against the executor, he cannot wage his law, by reason of his own deed. Ibid.

6. Where a bailment is made by deed sealed, yet the defendant may wage his law in action of detinue; for detinue, which is matter in fact, is the cause of action, which may be answered by matter in fact. Br. Ley Gager, pl. 3. cites 27 H. 8. 22.

7. If one brings debt on bond, and does not say *sigillo suo sigillat*. the

the defendant may wage his law. Arg. Mo. 333. says this Case was cited by the Ld. Chief Baron.

Co. Litt.
295. a. S.P.

8. It lies not where there is a specialty or deed to charge the defendant, but only where there is a *bare parol transaction*, which may be discharged as it was contracted; per Hatsell J. 12 Mod. 669. in Case of London City v. Wood.

See (D).

(C) For what Things.

Cro. E. 600. [1. **I**N debt upon arrearages of account before auditors en pais the
contra.—Br. law lies. 49 E. 3. 2. b. Curia. Contra 11 H. 4. 79. b.
Ley Gager, 51. cites 22 13 H. 4. 1. 14 H. 4. 19. and the Statute of 5 H. 4. cap. 8.]
H. 6. 35.—

Debt upon arrearages of account before auditors, &c. the defendant pleaded that nothing was owing to him, and that he was ready to aver by his law, and prayed that the plaintiff be thereof examined, and shewed to the Court an indenture, by which it appeared, that the parties put themselves in award of two, of all debates, who awarded that the defendant should pay to the plaintiff the sum aforesaid, which he showed for his matter; per tot. Cur. Such arbitrators are not his judges upon his account; for they cannot upon this matter award him to prison: but are arbitrators only, and not otherwise; and if he ought to have this action; yet after, he shall have a new action upon the same award, by which he was admitted to his law. Br. Ley Gager, pl. 52. cites 22 H. 6. 14.

Br. Ley Gager, pl. 51. [2. *[But]* in debt upon arrearages of account had before him-
self, the defendant shall have his law. 8 H. 6. 29. b. 20 H. 6.
6. 35. 41. b.]

Cro. E. 600. [3. In debt upon arbitrement upon submission without deed the law
Bowyer v. lies. 49 E. 3. 3. 11 H. 4. 56. b. adjudged. 1 H. 6. 1. b. 4 H. 6.
Garland.— 17. b. 8 H. 6. 5. b. 10. b. Curia. 19 H. 6. 10. 20 H. 6. 17.]
Br. Ley Gager, pl. 31.

cites 11 H. 4. 54. and 21 H. 6. 30. and pl. 34. cites 5 H. 5. 13. and 21 H. 6. 30.—In debt on arbitrement, defendant was ousted of his law by the Court. Lat. 213. Anderson v. Symonds.

[62] The reason why wager of law lies on award, if submission be by parol, is, that the submission is the ground of the action; per Holt Ch. J. 12 Mod. 630. in Case of City of London v. Wood.—And because the defendant has notice of the submission and award. Br. Ley Gager, pl. 105. cites 1 H. 7. 25. per Brian.

Br. Ley Gager, pl. 44. [4. In debt upon a contract for his table the law lies. 19 H.
6. 10.]
cites S. C.

S. P. per Moyle and Danby, but contra by Prisot and Needham. Ibid. pl. 70. cites 39 H. 6. 18.—9 Rep. 87. b.—Contra per Gawdy J. being only in Court. Cro. E. 818. Pasch. 43 Eliz. B. R. Bishe v. Walford.—S. P. per tot. Cur. quod nota; the reason seems to be inasmuch as it is at the election of the plaintiff, whether he would take them to table or not; but it is said elsewhere that it is contrary where the * keeper of a prison brings such action; for he cannot refuse the prisoner. Br. Ley Gager, pl. 50. cites 22 H. 6. 13.—S. P. Co. Litt. 295. a.

* S. P. Br. Ley Gager, pl. 44. cites 19 H. 6. 10. For he cannot live without eating and drinking.—*Debt by the keeper of the Tower against J. N. who was in his ward for treason, for his eating and drinking* from such a day to such a day, and the defendant tendered his law, and was ousted per Cur. contra of the salary of a priest. Brook says, the reason seems to be because the keeper *cannot* refuse the prisoner, and it is not charity that he should die for want of sustenance; *contra* for the eating and drinking of a man who is at large. Br. Ley Gager, pl. 8. cites 28 H. 6. 4.—† S. P. Br. Ley Gager, pl. 44. cites 19 H. 6. 10.—pl. 50. cites 22 H. 6. 13. pl. 55. cites 15 E. 4. 16. contra of a *viEtualler*.—S. P. Because it is a work of charity; per Ld. Chancellor and Doderidge J. in the Star Chamber. Roll. R. 338. Hill. 13 Jac. Adkinson v. Hobs.—The reason why in debt by gaoler against the prisoner for meat and drink, he cannot wage his law, is not, because the

the gaoler is obliged to find him victuals; for that is not true, as appears by Pl. C. 68. a. but because the defendant is in durance, and the plaintiff cannot take security from him for re-payment; for a bond will be void, so that he must be content with a promise; per Holt Ch. J. 2 Salk. 684. 2d of March 1701. Mood v. the Mayor of London.

(D) Ley Gager. [*Not where a Man is compellible to do the Thing.*]

See (C) pl. 4. in notis.— See Gaoler (B).

[1.] If a labourer within the statute brings debt for his wages defendant shall not have his law; because he was compellible to serve by the statute. 3 H. 6. 42. b. 34. 11 H. 6. 48. b.]

Mo. 698.— S. P. otherwise it is, if he be not retained ac-

cording to the statute. Co. Litt. 295. a.—Debt upon a retainer in husbandry for his salary arrear, the defendant said, that he did not retain him in husbandry, and a good plea, by reason that he cannot wage his law in this case, and therefore he may traverse the contract; quod nota bene. Br. Contract, &c. pl. 20. cites 18 H. 6. 22.

S. C. cited per Holt Ch. J. who said, that the reason of being compellible to serve is no reason; for though he be bound to serve, yet the other is not bound to take him. But the reason is, because it is hard that the master should be put to wage this law, but rather that the plaintiff should be put to prove his retainer by the statute. 12 Mod. 683.

[2. If a man covenants to serve me at my * plough, and to find what is necessary for this business as the plough itself, † wagons, carts, &c. for so much a year, &c. In debt for this, I may wage my law; for this is not within the statute to be compelled to serve so. 3 H. 6. 42. b.]

* Orig. Carve—† Orig. Chare.

[3. If a man be retained to scald hogs by the year for so much, in debt for this he shall have his law; for it is not within the statute to be compelled to serve. See 3 H. 6. 42. b.]

S. P. Br. Ley Gager, pl. 5. cites S. C. For he who may compell

stranger to serve by the statute, and is retained accordingly, his labour and his salary is contained in the statute; therefore such shall not be barred by Ley Gager; contra of others.

[4. If a man retained to sing masse by the year for so much brings debt for it, the defendant may wage his law; because he was not compellible to serve by the statute. 11 H. 6. 48. b.]

9 Rep. 88.

[5. If a man be retained to be of his counsel for so much by the year, &c. In debt for this he shall have his law; (for he is not compellible in this manner.) 3 H. 6. 34. b. 42. b. adjudged.]

['63] S. P. Br. Ley Gager, pl. 4. cites 3 H. 6. 34.

and Brook says, the reason seems to be, because none shall be ousted of his law in such case, but against servants of husbandry, and labourers who are retained by the statute, and take wages expressed in the statute.

[6. If an attorney of B. sues an action of debt against his client, for fees and charges disbursed in the Court, the defendant cannot wage his law. M. 37 El. B. Curia Mich. 37 & 38 El. B. R. between * Germayn and Rowles, adjudged by admittance. Tr. 40 El. B. per Curiam. Co. 1 Inst. fol. 295. sect. 514. Because an attorney is compellible to be his attorney. 21 H. 6. 4.]

* Cro. E. 425. 459. S. C. Br.— Ley Gager, pl. 45. cites 21 H. 6. 4. S. P.

[7. If a solicitor, retained to solicit a suit, sues an action of debt for fees and charges which he had expended in the suit, the de-

defendant may wage his law. Mich. 37 & 38 El. B. R. adjudged by admittance.]

[8. If an *attorney of B. R.* brings action of debt *for his fees, and other expences of suit in B.* the defendant may wage his law. Tr. 40 El. B. between *Jenkinson and Sharpe*, adjudged; because he is not compellible to be his attorney there.]

Br. Ley Gager, pl. 45. cites S. C. accordingly.

[9. If an *attorney of B.* brings action of debt, *because he was his attorney in an inferior Court*, the defendant shall have his law; because he was not compellible to be his attorney there. 21 H. 6. 4.]

* Fol. 108.

S. P. Br. Ley Gager, pl. 45. cites S. C. For

Brook says, it seems, that he is *not compellible to be of counsel for a whole year, nor for two years, nor for any fee certain for the whole year.*

Br. Labourers, pl. 36. cites S. C.

11. *Debt* because the *plaintiff retained the defendant for eight years for 20 s. per ann. to serve in all occupations, and for 8 l. arrear, for his service of eight years, action accrued, &c.* The defendant tendered his law; and per Cur. a *taylor, carpenter, &c.* who are *artificers* shall not be compelled to serve by the statute. But a *ploughman, shepherd, &c.* shall be compelled to serve, and therefore as to them ley gager lies not of their salary. But here, because the retainer was *in all occupations*, and does not say in husbandry, therefore the law was admitted. But by the reporter, because husbandry is parcel, and of this the law lies not, therefore it lies not in any part. But judgment was ut supra. Br. Ley Gager, pl. 66. cites 38 H. 6. 14.

Br. Ley Gager, pl. 70. Per Moile and Prisot, cites S. C. * S. P. 9 Rep. 87. b.

12. If an *hostler will not lodge me, I shall have action upon the case, and so of a victualler who will not sell me victuals; and yet in debt for these victuals, the defendant * may wage his law; per Moile and Prisot. Br. Action sur le Case, pl. 76. cites 39 H. 6. 18.*

For a victualler or hostler is not compellible to deliver victuals till he is paid for them in hand.

13. Where a man *retains* another for 10 l. to go to Rome to obtain a bull, &c. in debt for this the defendant may wage his law; quod nota, per all the justices; for this is not a retainer according to the statute of husbandry, where they shall be compelled to serve; therefore in that case the law will not lie. Br. Ley Gager, pl. 70. cites 39 H. 6. 18.

(E) Of what Thing it lies touching Realty.

[1.] *In detinue of charters concerning his franktenement*, the law does not lie; for it is real. 20 H. 6. 38. Dubitatur 38 E. 3. 7.] S. P. Co. Lit. 295. a. So of a lease for years & for it con-

cerns the land, and is a chattel real; and so it was lately adjudged in B. R. quod nota bene inde. Br. Ley Gager, pl. 97. cites 34 H. 8.—Co. Lit. 195. a. S. P.

[2. So in detinue for a release of all right in his franktenement, the law does not lie; because it is real. 20 H. 6. 38.]

[3. But if a man has charters in his custody concerning the land of another man, and he bails them to re-bail, if he brings detinue against bailee, he may wage his law; because they are chattels between them. 20 H. 6. 38.] In detinue of charters, if the plaintiff does not in-titile himself to the land,

the defendant may wage his law; for if a man gives me a deed of feoffment, it is only a chattel in me, contra if I have the land; per Pigot. Br. Ley Gager, pl. 75. cites 8 E. 4. 3.

[4. In debt for rent upon lease for years, the law does * not lie; for it is in the realty. 1 H. 6. 1. 9 E. 4. 1. 4 H. 6. 17. b. 8 H. 6. 5. b. 29. b. 20 H. 6. 16. a. b. Contra 44 E. 3. 42. Contra 50 E. 3. 10. b. adjudged.] * S. P. Co. Litt. 295. a. It will not lie, though it was upon a parcel lease;

per Holt Ch. J. Because it is in the realty, and arises from the taking the profits of the land, and occupation of it in the country; and so the notoriety of the thing excludes the defendant from waging his law; per Holt Ch. J. 12 Mod. 681.

[5. But if a man lease sheep, rendering rent; in debt for the rent ley gager lies; for it is not real. 1 H. 6. 1. b. Curia. (For this is not a rent).] Br. Ley Gager, pl. 64. cites S. C. and that Cot. Serjeant took

the reason of the difference between Ley Gager not lying in debt upon a lease for years, and lying upon a lease of beasts to be, that of a lease of land, ejectment or quare ejecit infra terminum lies, but not of beasts; for lease of land is notorious to the consueance of the country. But Brook makes a quare of the principal Case.

[6. In detinue for an obligation the law lies; because it is not real. 38 E. 3. 7.] Orig. (Ga-lins.)

7. Debt, in the detinet without the debet, of certain corn, and rent fowl, and counted upon a lease for years of certain land, reserving the corn and fowl; and because the writ was in the detinet, he waged his law, and was admitted to it; and yet it was granted, that debt shall not be in the debet, but of money only, and therefore error as it seems. Br. Ley Gager, pl. 26. cites 50 E. 3. 16.

8. In an action of account against a bailiff of a manor, the defendant cannot wage his law, because it soundeth in the realty. Co. Litt. 295. a. S. P. per Holt Ch. J. 12 Mod. 681.

9. In account for profits of 14 acres of land for six years, defendant cannot wage his law. Mo. 468. Mich. 39 & 40 Eliz. Popworth v. Arche.

(F) *Part Real, Part Personal.*

Br. Ley Gager, pl. 86. cites S. C.

[1.] *In detinue of a box with charters and muniments, if the plaintiff counts not of any charters in particular, the defendant may wage his law of the whole. 19 H. 6. Because before the shewing of it, the box and all in it is but a chattel. 19 H. 6. 9. b.]*

[65]

[2. If detinue be brought for a chest sealed, with money and charters of land in it, the law lies. 44 E. 3. 41. b. (of the whole).]

[3. But otherwise it is if he declares of certain charters in particular, and if the writ be not that the chest was sealed. 44 E. 3. 41. b.]

Br. Ley Gager, pl. 43. cites 19 H. 6. 9. and pl. 86. cites S. C.

[4. But in detinue of charters inclosed in a chest, if he declares of one charter in particular, the defendant cannot wage his law of it. 20 H. 6. 38.]

S. C. — Defendant said it was a box, and justified, &c. *absque hoc* that it was a chest, &c. and held a good plea; and yet defendant might have waged his law. Br. Ley Gager, pl. 79. cites 22 E. 4. 7.

Br. Ley Gager, pl. 43. cites 19 H. 6. and pl. 86. cites S. C. — pl. 79. cites 22 E. 4. 7.

[5. In detinue of certain charters and muniments contained in a chest, and declares of one charter in particular, the defendant may wage his law of the residue. 10 H. 6. 20. b. adjudged 11 H. 6. 9. b. 14 H. 6. 1. 19 H. 6. 9. b. 20 H. 6. 38.]

— In such case the defendant waged his law as to all but this charter, and did it immediately; and the reason seems to be that when it is in a chest inclosed the charters are of the nature of the chest which is only a chattel; contra of charter special; for of this he cannot wage his law, because it concerns *franktenement*. Br. Ley Gager, pl. 61. cites 14 H. 6. 1.

Br. Ley Gager, pl. 86. cites S. C.

[6. But he can not wage his law of the chest; for it is of the nature of the charter. Dubitatur 11 H. 6. 9. b. 14 H. 6. 1.]

— So where the count was of box with charters concerning his inheritance, and counts of 4 in special shewing how, &c. The defendant as to 2 pleaded *re-delivery* in another county, and as to the 4th the writ *abated*, and to the box and the other charters he waged his law, and the law was received without challenge. Br. Ley Gager, pl. 68. cites 38 H. 6. 25.

Gawdyheld, that he should not be admitted thereto; for it is a real

7. In sale of land for 40 l. the defendant may wage his law in debt of it; for though the land be real, yet the bargain and contract is personal; per Newton; quod nullus negavit. Br. Ley Gager, pl. 87. cites 22 H. 6. 43.

contract; but all the other justices e contra; whereupon it was ruled, that he should make his law, &c. Cro. E. 750. Pasch. 4. Eliz. B. R. Miller v. Eastcrowe. — Cites 22 H. 6. 44. 34 E. 1. 18 E. 2. 31 E. 3. 34 H. 6. tit. Ley. 28, 45, 72, 73.

8. In debt, if a man leases a chamber to another, or his friend, and takes him or his feme and son to table, rendring for the said chamber

chamber and tabling 6 s. a week, the defendant cannot wage his law. Br. Ley Gager, pl. 58. cites 9 E. 4. 1.

9. So of lessor of a manor stored with beasts. Ibid.

Contra of a lease of beasts rendering rent, without land, the defendant may wage his law in debt for the rent. Ibid.

(G) In what Action it lies.

[1.] N action upon the case against a surgeon, because he undertook to cure him of his hurt, and did it so negligently that he is maimed, the defendant may wage his law. 48 E. 3. 6. Curia. Because it is not supposed *vi & armis* nor *contra pacem*.

S. P. Br. Ley Gager pl. 2. cites S. C. but the plaintiff offered to

demur in law, and therefore the defendant put himself upon the country; but note that at this day a man cannot wage his law in action upon the case.

[2. In an attachment upon a prohibition the defendant cannot wage his law, that he has not sued against the prohibition, because the writ supposes him to do it *contra pacem*. 18 E. 3. 4. 2 E. 3. 35. b. adjudged. Contra in time of E. 1. 69. adjudged.]

Br. Ley Gager, pl. 88. cites 4 E. 3. contra. —

And by the reporter, be-

cause he comes by *capias*, he ought not to have his law; for *rex est pars for the contempt*, &c. Br. Ley Gager, pl. 56. cites 24 E. 3. 39. and 18 E. 3. 4. — And it is a contempt of the King. Ibid. pl. 17. cites 44 E. 3. 32. [66]

3. In writ of *detinue of charters*, a man shall not wage his law. Br. Arbitrement, pl. 2. cites 9 H. 6. 60.

4. In action of debt in London upon a *concessit solvere to pay*, the defendant may wage his law, though it be a *customary action*. Br. Ley Gager, pl. 69. cites 38 H. 6. 32.

5. Debt against an abbot, of a contract between him and the predecessor of the abbot, and averred that the stuff came to the profit of the house; the abbot tendered his law, but could not have it; for, per Brian, he had not notice, nor was party to the contract. Br. Ley Gager, pl. 105. cites 1 H. 7. 25.

Br. Ley Gager, pl. 107. cites 13 H. 7. 2. 3. Contra per all the justices except

Brian; for the writ is in the debt, and not in the detinet, as against executors.

6. But in debt upon a recovery in ancient demesne the defendant may wage his law. Ibid.

7. So of baron and feme of the debt of the feme, they may wage their law, for there is notice of it in them. Ibid.

8. If a man recovers damages in writ of right, or other action in ancient demesne, and brings debt of the damages recovered, the defendant may plead *nul tiel record*, and it shall be tried per pais, and the defendant shall not wage his law. Br. Court Baron, pl. 1. (bis) per Littleton; but Brooke says *quære inde*.

9. In debt for money won at play, the defendant was allowed to wage his law. Bull. 186. Pasch. 10 Jac. Harrison v. James.

Fol. 109.

(H) By other Hands. Bailment, Contract.

S. P. Br. [1.] F *detinue* be brought *against successor dean upon bailment to*
Ley Gager, *his predecessor*, the law lies. 44 E. 3. 41. b. Curia.]

pl. 19. cites

S. C. Brook says, and so see that he shall not be in a worse case than his predecessor; and after the plaintiff counted of *certain charters special*, and no mention was in the writ of any * *special charter*, but in the count, and upon this the defendant tendered his law again, and was ousted; and so see a *difference*, where he counts of a *charter special*, and where of a *chest sealed with charters*.—* Orig. (Servic.)

Br. Ley

Gager, pl.

54. cites 15

E. 4. 16. accordingly, per Brian; but per Choke it is all one. 10 E. 4. 5.

*For the
baron and
feme are
one person
in law, and
therefore it

is the immediate receipt of the plaintiff himself. Br. Ley Gager, pl. 54. cites 15 E. 4. 16.—S. P. Co. Litt. 295. a.

[4. If a *monk makes contract as officer* of the abbot, and after is *made abbot*, he may wage his law of it. 46 E. 3. 10. b.]

[5. If my *attorney general to retain servants retains a servant for certain wages*, and he brings *debt against me* for the wages I may wage law; yet contrary by the hands of the attorney. 46 E. 3. 10. admitted.]

For both are
of one and
the same

corporation, viz. the abbot and the monk; per Brian. Br. Ley Gager, pl. 92. cites 5 E. 4. 5.—Co. Litt. 195. a.

[67 [7. In account by *baron upon receipt by hands of the feme plain-*
Br. Ley *tiff* the law lies. 13 H. 4. 8. 2 H. 5. 3. Curia.]
Gager, pl.

92. cites 15 E. 4. 16.—Co. Litt. 295. a.—S. P. adjudged; because a receipt by the hands of the wife of the plaintiff, or defendant, is all one [as a] receipt by their own hands. Cro. E. 919. Hill. 45 Eliz. C. B. Goodrich's Case.

Br. Ley

Gager, pl. 1.

cites 18 H.

8. 3. pl. 47.

cites 21 H.

6. 30.—S. P. because the detinet is the ground of the action, and the bailment, though it be by another hand, is but the conveyance, and not traversable. Co. Litt. 295. a.

For they are
not charged
for the bail-
ment but by
their own

possession; for where they shall be charged as executors, they cannot wage their law; because of another's act a man cannot wage his law. Br. Ley Gager, pl. 89. cites S. C.

[10. But

[10. But otherwise, it is in account upon bailment by other hands, for there the receipt is traversable. 8 H. 6. 10. b. 18 H. 8. 3.] Br. Ley Gager, pl. 1. cites 18 H. 8. 3.—S. P. because the receipt is the ground of the action, which lies not in privity between the plaintiff and defendant, but in the notice of a third person. Co. Litt. 295. a.

[11. In debt upon arbitrement by executor upon submission and award in life of testator, the law does not lie, because by other hands. Contra 8 H. 6. 5. b. admitted.] Co. Litt. 195. a. contra, that in an action of debt upon an arbitrement by the bailment of another's hands, the defendant shall wage his law; because the debt is the ground of the action, and the contract, though it be by another hand, is but the conveyance, and not traversable.

[12. In detinue against executor upon bailment to the testator the law lies, because he is charged of his detinue. 11 H. 6. 40. b. admitted.]

[13. In debt against executor upon a borrowing by the testator, the law does not lie, because the contract [was] made by other hands. Contra 17 E. 3. 1. b.] Wherefore ever a man is charged as executor or administrator, he shall not wage his law; for no man shall wage his law of another man's deed, but in case of a successor of an abbot; because the house never dies. Co. Litt. 295. a.

[14. In debt by executor upon a contract made to the testator, the law lies though it is made by other hands. 29 E. 3. 36. b. adjudged.]

[15. If an executor brings detinue of chattels of the bailment of his testator, the defendant may wage his law, though it be by other hands. Because in a detinue upon bailment by other hands, the defendant shall wage his law; for the bailment is not traversable. Contra 2 E. 2. Fitz. Ley. 56.]

16. Debt against an abbot, and counted of a sale of 10 oxen to his predecessor, which came to the use of the house, and the defendant tendered his law; and Newton, Paston, and Ascue J. doubted, inasmuch as it was of another's contract, whether he shall be permitted to make his law? Quere; for the contract is not properly the matter, but the sale to the use of the house, which lies in notice of Pais. Br. Ley Gager, pl. 46. cites 21 H. 6. 23.

17. By the 4 & 5 Anne 16. it is enacted, That actions of account may be brought against a bailiff or receiver, for receiving more than his just share, and an action of account was brought upon this statute, against defendant, as bailiff ad merchandizandum, who waged his law; and upon demurrer, it was objected that wager of law would not lie against a bailiff ad merchandizandum; but if action had been brought against a receiver, and plaintiff did not shew by whose hands, the wager of law would lie, and so it was adjudged in this case for the plaintiff. 8 Mod. 203, Trin. 10 Geo. 1725. Page v. Barnes. [68]

(I) By other Hands.

S. P. but in account by the baron of receipt by the defendant, by the hands of the feme [1.] **I**n account upon receipt by other hands, the law does not lie. Dy. 10 El. 265. 2. 29 E. 3. 26. b. 36. 30 E. 3. 19. 22 H. 6. 39. 13 H. 7. 3. 33 H. 6. 8. b. 21 E. 4. 55. b. 18 H. 8. 3. Because the receipt is traversable in this action. 10 E. 4. 8. 34 E. 3. Fitz. Ley. 61.]

of the plaintiff, the defendant may wage his law; for the baron and feme are one person in law, and therefore 'tis an immediate receipt of the plaintiff himself. Br. Ley Gager, pl. 54, cites 15. E. 4. 16. — 2 Saund. 61. — Mod. 681 per Holt Ch. J. — In account brought against receiver, as having received by the hands of the plaintiff, wager of law will lie. But if by the hands of a third person, it lies not; because it appears from the nature of the action, that a third person can prove the receipt; per Holt Ch. J. 12 Mod. 679.

[2. In account, if defendant before auditors pleads payment by other hands, the plaintiff shall not wage his law of it. 29 E. 3. 36.]

[3. In debt, if the plaintiff supposes that the defendant owed to him 10 l. which he delivered him by the hands of such a one, to repay at such a day, at which day he did not pay it, the defendant may wage his law. 29 E. 3. 26. b. adjudged.]

[4. So if a man sells goods for a certain sum, and delivers them by the hands of his servant, and after brings debt for the sum upon the contract, the defendant may wage his law; because the contract was not made by * other hands; for the delivery of the goods after the contract is not any cause of action. 29 E. 3. 36. adjudged.]

[5. In a debt if plaintiff counts upon a contract, scilicet, that defendant owes him 10 l. for certain goods sold to him by J. S. his servant, the defendant may wage his law; for he has counted (as he ought) that he himself sold the goods by his servant, so that the contract was made to the plaintiff himself. 30 E. 3. 19. adjudged 24 E. 3. Ley. 63.]

[6. In a detinue, if the plaintiff counts of a bailment of certain goods by other hands. The defendant shall have his law; for he shall not have any answer to the bailment, but he shall answer to the detinue. 18 H. 8. 3. 32 H. 6. 12. 13 H. 7. 3. 33 H. 6. 8. b. 34 E. 3. Fitz. Ley. 61.]

Br. Ley
Gager, pl.
41. cites 8
H. 6. 10.—
The reason
of the di-
versity is,
that in a de-

clar. In detinue, the bailment is no necessary ingredient, and the plaintiff, by alleging an unnecessary thing, shall not bar the defendant from waging his law; for if in detinue the defendant should plead *nihil detinet*, and put himself upon the country, and upon trial it appears, that the defendant found the goods, instead of having them by the bailment of a third person, yet the plaintiff shall recover; so the gist of the action is not the delivery of the goods, but the detainer is the only material part of the action, and the whole point is, whether he detained the goods; and that is a matter of secrecy; per Holt Ch. J. 12 Mod. 680. In Case of City of London v. Wood.

Br. Ley
Gager, pl. 1.
cites 8 H.
8. 3. [7. In action of debt upon a contract by other hands, the defendant may wage his law; because he ought only to answer the debt. 18 H. 8. 3. 34 E. 3. Fitz. Ley. 61.]

[8. If an executor brings an account against another, as receiver by the hands of testator, the defendant cannot wage his law, that he never was receiver of the money by the hands of the testator. For this is a rescit by other hands, though the executor represents the person of the testator. Dy. 2 El. 183. 60. Per Cur. see the precedent of this pleaded New Entries Accompt 48. and there cites this book, that he was ousted of his law, when he came [69] to make it. 7 E. 3. 47. Vide 2 E. 2. Ley. 56.]

(K) What Person may wage the Law.

[1. **A**N infant shall not wage his law, because he cannot make oath. 11 H. 6. 40. b. 38 E. 3. 8. b.] Co. Litt. 295. a. S. P. and

therefore by the best opinion, where *detinue* is brought against two as executors, and one is an infant, and they offer their law, they shall be compelled to the general issue ad patriam. Quære inde. Br. Ley Gager, pl. 101. cites 11 H. 6. 40.

[2. So where two ought to have their law, and one is under age, both shall be ousted, because the infant cannot, and both ought to join in plea. 11 H. 6. 40. b.]

[3. A man who is *dumb and not deaf*, may wage his law of *non-summons*, and make it and shew his assent by signs. 18 E. 3. 53. adjudged.]

[4. In an account if the defendant before auditors pleads payment, or other thing given in satisfaction, the plaintiff may wage his law of it, though he be plaintiff. 29 E. 3. 36. 30 E. 3. 4. b.] See (B) Pl. 3.

5. Tenant who is summoned by one summoner where there ought to be two, may wage his law of non summons, according to the law of the land; but the vouchee shall not wage his law of non summons upon the writ of summons. Br. Disceit, pl. 11. cites 50 E. 3. 16.

6. In *formedon* against a feme who made default, and grand cape issued returnable 15 Mich. before which day she took baron, and at the day appeared and waged her law of non summons; and the feme made her law alone without her baron, and the writ abated. Br. Ley Gager, pl. 32. cites 12 H. 4. 24.

7. He who is *attainted of any falsity*, or is *perjured*, shall not wage his law. Quod Nota Bene. Br. Ley Gager, pl. 81. cites 33 H. 6. 32. per Litt. Co. Litt. 295. a.

8. Debt was brought against J. R. de W. in Com. L. Chapman; the defendant appeared by his attorney, and offered to wage his law, and effoigned; and at that day the plaintiff appeared, and the defendant being solemnly required, one J. R. came to answer the plaintiff as defendant in that action, in his proper person, and offered to wage his law; the plaintiff said, that J. R. now appearing to wage his law, ought not to be admitted, because the said J. R. is not that person which the plaintiff prosecutes; for this J. R. who appears is J. R. de W. in Com. L. Junior, Chapman, and he whom the plaintiff prosecutes, is J. R. de W.

In Com. L. Senior, Chapman, both of them, at the purchasing the plaintiff's writ, *living at W.* and that he agreed with the defendant so to do, therefore because J. R. de, &c. hath not appeared to wage his law, prays judgment: the *defendant confesses such matter*, and says, that he believing that the writ was prosecuted against him, appeared by his attorney, and offered to wage his law, and *prays to be discharged* of the debt; and the other J. R. being exacted, appeared not; and the court would advise; but *no judgment for the plaintiff*. Brownl. 55. cites Mich. 4 Ed. 4. Rot. 144.

9. *Executors* cannot wage their law; per Brian and Littleton. Br. Examination, pl. 22. cites 20 E. 4. 3.

10. In *account*; the *defendant* upon his account *alleged tallies of the plaintiff*, by which he had received certain of the money, and the *plaintiff* waged his law, that they were not his tallies; and it was admitted; and so see that the *plaintiff* may wage his law, and by it shall charge the defendant. Br. Ley Gager, pl. 40. cites 21 E. 4. 49.

[70] 11. A * *bailiff* may not wage his law, but a *receiver* may. S. C. cited Cro. El. 790. Mich. 42 & 43 Eliz. C. B. Shyfield v. Barnfield. 2 Salk. 684.

—* S. P. For it is a matter triable per pais. Cro. E. 579. Archer's Case. — S. P. per Holt Ch. J. and says, the reason the book gives, is, because it is *in the realty*, and he said, that is as much as to say, as because it is *notorious to the country*; because the country takes notice of his looking after the manor, and they have thereby an opportunity of knowing that he received his rents, &c. 12 Mod. 681.

Brownl. 53. 12. A. brought debt upon joint contract, against B. C. D. and S. C. by name of EASINGTON V. BURCHER & al. and that the appearing by a joint supersedeas will not hinder, but that they may vary in plea. — Hutt. 26. Mich. 16. E.—E. was outlawed, B. C. and D. appeared by a joint supersedeas. B. tendered his law, that he with the rest did not owe.—C. and D. plead *nil debent per patriam*. It was insisted that B. should not be admitted to his law alone, because they were all charged as one defendant, being for a joint debt, and so that they must all answer together. But this was held to be unreasonable; for if so, then by joining [others] with me, as joint defendants, I must be subject to their plea, though they would confess the action; and though defendants may not sever in dilatories, yet in bars they may. And after divers motions and precedents produced, B. was received to his law, and the plaintiff nonsuited. Hob. 244. Ellington v. Bourcher.

Jac. S. C. by name of EASINGTON V. BOUCHER, and there mentions several precedents, one whereof was Hill. 13 Jac. Rot. 841. FLEET V. HARRISON and BROOK. Where F. brought debt against H. and B. upon an emiffent, and H. waged his law, and judgment against Brook by nihil dicit. *Et quia conveniens est quod judicium de loquela prædicta unicum sit versus prædictos Isaac & Jacobum, si contingat ipsum Jacob de perficiend. legem suam prædictam deficere, ideo partiat in judicium inde versus præfatum Isaac reddendum quousque prædictus Jacobus legem prædictam perficeret, sive inde deficeret; & postea prædictus Jacobus perfecit legem suam. Ideo consideratum est per Curiam quod prædictus querens nihil capiat per breve suum prædictum sed sit in misericordia pro falso clamore suo inde, & quod prædictus Jacobus eat inde sine die.* And according to this precedent it was agreed per Cur. that so it ought to be.

(K. 2) *By Attorney, In what Cases,*

1. *PRÆCIPERE* quod reddat; the *tenant made default after appearance*, by which *petit cape* issued, at which day he *appeared by attorney*, and the *attorney waged the law*; quod nota. Br. Ley Gager, pl. 28. cites 7 H. 4. 3.

But in *præcipe quod reddat* the *wager of law* shall be by the tenant in person, and not by attorney; therefore the attorney shall not be effoigned at the day, but the tenant himself in pain of losing seisin of the land by his default. Br. Ley Gager, pl. 29. cites 7 H. 4. 6.

(L) *Against whom it lies,*

- [1.] IN an *action brought by the Prince of Wales* the defendant shall wage his law. 34 E. 3. Ley. 82.]

2. In debt brought by *merchant-stranger* it lies not. Palm. 14. Arg. cites 5 E. 2.

3. Where one is *indebted by specialty to a man attainted* the King shall have it, & e contra if it be without specialty; for there the debtor may wage his law against the person attainted, contra *against the King*, though it was *upon contract only*; and therefore he shall not be in a worse case than he was before, and so the King shall not have the debt; per Hamm and Holt, quod non negatur. Br. Ley Gager. pl. 25. cites 49 E. 3. 5.

A man can not wage his law against the King. Quod nota bene, that where the King is party there the defendant

cannot wage his law. Br. Ley Gager, pl. 72. cites 50 E. 3. 1. — 4 Rep. 95. b. in a nota of the reporter it is said, that in every quo minus in the Exchequer, brought by the King's debtor against one who is indebted to him upon simple contract, the defendant shall not have his law, for the benefit of the King, as appears in 8 H. 5. Ley 66. 20 E. 3. Ley 52. 10 H. 7. 6. and yet there the King is not party; a fortiori where such debt or duty is forfeited to the King, and he is the sole and immediate party. — For debt forfeited to the King by common law no Ley Gager lies. Cro. C. 187. Morgan v. Green. [71]

4. *Quo minus in scaccario* against him who *usurped upon the possession of the King which was leased to the plaintiff*, so that he could not pay his farm to the King, the defendant may wage his law, as appears in a short note there, where it is said, that in 4 E. 4. it was adjudged, that a man may wage his law in a *quo minus*; but contra anno 8 H. 5. tit. Ley. p. 66. in Fitz. which was agreed for law 35 H. 8. Br. Ley Gager, pl. 102. cites 32 H. 6. 24.

5. In debt *by assignee of commissioners of bankrupts* the defendant pleaded nil debet, and waged his law. And the Court held that he might, though the interest and power to sue in his own name be good to the plaintiff by the statute of bankrupts. But otherwise if the duty itself had been originally due by the statute. Noy. 112. Osborne v. Bradshaw. cites 10 H. 7. 18.

6. If

6. If an *infant* be *plaintiff*, the defendant shall not wage his law. Co. Litt. 155. 2.

7. An action doth not lie against an *executor* upon a *concessit* solvere of the testator upon a special custom; per Roll. Ch. J. For this would be to charge an executor in an action of debt, where he may by the law wage his law; and an action of debt lies not against an executor upon a simple contract made by the testator. Adjournatur. Sti. 199. Hill. 1649. B. R. Hodges v. Jane.

See Gager
(B).

(M) *In what Cases it lies for a collateral Respite.*

[1.] *N detinue*, if defendant acknowledges the *detinue* in pleading, he cannot wage his law. 39 E. 3. 9.]

[2. If *A. delivers money to B. to deliver over to C. and after A. brings account against B. and he pleads never his receiver to render account*, he shall not wage his law; because his *resceit* was conditional whether to account or not. M. 13 Ja. B. between *Bedle and Pilgrim* adjudged. (It seems it is intended that he shall not wage his law, *that he had delivered it over*; because upon this issue he cannot give it in evidence, but ought to plead it specially.)]

* Fol. 111.

S. P. For when the matter of the charge is pregnant with matter

[3. In action of debt against baron for wares bought by his *feme* without the assent of the baron for her apparel, the baron shall not wage his law; because * it may be, that this was *necessary apparel*, and it may be *e contra*, and so a matter in law which the baron by his wager of law shall himself determine. Dubitatur. M. 13 Ja. B. Sir Thomas Gardiner's Case.]

of law, there ought to be no wager of law; for that were to swear to the law; per Hatfel J. 12 Mod. 671. in Case of the City of London v. Wood.

4. A man retained an attorney for his master for 10*l.* per ann. by deed; in debt by the attorney, the master may wage his law. Br. Ley Gager, pl. 95. cites 46 E. 3. 10.

5. But if the master makes the servant who retained his executor by deed, and dies; there in debt by attorney against the executor, he cannot wage his law by reason of his proper deed. Ibid.

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*Orig. (Celerer).—But if the same officer

6. And per Persey, if the * butler, or other monk, who is an officer in an abby, makes a contract for stuff which comes to the use of the house, the abbot cannot wage his law. Ibid.

he after made abbot, he may wage his law. Ibid.—But Finch. denied it, and said that the abbot may wage his law of the contract of his monk; and the same law of the baron of the contract of his *feme*. And Brook says, the law seems to be with Finch. Ibid.

7. In debt upon a buying, the defendant tendered his law; the plaintiff said, that the defendant in the same action confessed the buying, and that it was to the use of the King; and the plaintiff

plaintiff said, that it was to his own proper use, and the defendant had aid of the King, and so the buying confessed, judgment if the law &c. and yet the defendant had his law; the reason seems to be because it *may be that he had paid*. Br. Ley Gager, pl. 30. cites 7 H. 4. 7.

8. The defendant *upon examination* waged his law in debt upon arrears of account, *because the matter lies not in account*. Br. Ley Gager, pl. 33. cites 14 H. 4. 19.

Br. Examination, pl. 15. cites 14 H. 4. 19.—
Debt upon

arrears of account, the defendant tendered his law, and *prayed that the plaintiff be examined*, and so he was, and *found that it was for debt upon contract*, and therefore it lies not in account, for it was always certain; by which the plaintiff was moved to amend his entry, and would not, wherefore the defendant made his law immediately with 12, of which one was *challenged for nonage*, and adjudged of full age by inspection, and so the law admitted. Br. Ley Gager, pl. 42. cites 8 H. 6. 15.

9. *Debt upon arrears of account before auditors assigned*, the defendant tendered his law, that he owed him nothing, and prayed that the * plaintiff be examined whether it lies in account; and *upon the examination it appeared that the defendant leased to the plaintiff an hostery and stuff*, and at the end of the term they accounted, and was arrear of part of the rent, and part of the stuff was wasted; and therefore, because he might have had debt upon the lease for the rent, and *detinue* for the stuff, though it be worn or wasted, the defendant was admitted to his law. Br. Ley Gager, pl. 6. cites 20 H. 6. 16.

* This in all the editions of Brook is defendant, but it seems it should be plaintiff according to Br. Examination, pl. 9. which cites S. C.—
So where the defend-

ant said, that he owed him nothing, and that he was ready to make his law, and prayed that the plaintiff be examined, and *upon the examination said, that it was before one auditor only*, and therefore the defendant was admitted to his law, per Cur. For the statute mentions (*before auditors*.) Br. Ley Gager, pl. 7. cites 20 H. 6. 16.—S. C. cited, and judgment accordingly. Goldsb. 75. pl. 4. in Bottock's Case.

10. *Detinue of two writings obligatory*. Per Newton, where the plaintiff declares upon bailment in one county, where the bailment was in another county, the defendant may wage his law, and if he will not, he may be twice charged; but per Markham contra. Br. Ley Gager, pl. 48. cites 21 H. 6. 35.

And per Newton, if a contract be made in Middlesex, and action is brought

in Essex, the defendant may wage his law. Br. Ley Gager, pl. 48. cites 21 H. 6. 35.

11. In debt for one horse sold for 10 l. where two were sold for this sum, or e contra; or if he counts of a cow sold, where it was a robe, defendant may plead that *nihil debet modo & forma per patriam*, and the jury upon evidence thereof ought to find for the defendant, in pain of attain; per Cur. and hence it appears that he may wage his law by conscience; for 'tis another contract. Br. Ley Gager, pl. 93. cites 21 E. 4. 22.

S. P. Mo. 49. pl. 148.—So where the plaintiff supposes the contract between him and defendant, and defendant says

it was between them and another; in these cases defendant may wage his law, and ought not to traverse the contract. Ibid.

12. So in detinue of a chain of four ounces, which is only two ounces, the defendant may wage his law; for he did not detain such chain. Br. Ley Gager, pl. 78. cites 22 E. 4. 2.

So in detinue of a white horse which in fact is red or black.

Ibid.—So in detinue of a piece of cloth of 20 yards, where is only 13 yards. Ibid.—Contra of

of alleging of the value; for where he brings detinue of a horse of 20 l. price, which is not worth 20 l. or of cloth or a chain of 20 l. value, which is not worth 7 l. he cannot wage his law by conscience. Note a diversity by award of the Court. Ibid.——S. C. cited C. 219. b. pl. 11.

13. In *detinue of Charters* gaged for money lent, the defendant may wage his law, if the plaintiff does *not count of a charter special*. Br. Charters de Terre, pl. 62. cites 22 E. 4. 7.

See D. 219.
b. pl. 11.
Bladwell v.
Slaggen,

14. In *debt*, plaintiff counts on a *contract*; defendant says he made a contract for a *less sum*, absque hoc, that he made any contract for the sum comprized in the writ, as the plaintiff has supposed; per Cur. he shall not have his plea, because he may wage his law. Mo. 49. pl. 148. Pasch. 5 Eliz. Anon.

15. *A. was indebted to B. on a contract*; after C. gives B. bond for the money, and A. gives C. counter bond, A. cannot wage his law; for the contract continues; but had C. given the bond at the time of the contract, it had been otherwise. 2 Le. 110. Trin. 29 Eliz. Hooper's Case.

16. A. sold woad to B. on condition that if A. did not prove it good and sufficient, B. should pay nothing for it; per Windham J. If the case be so, B. may wage his law; and it was said, that A. must have detinue for the woad. Goldsb. 65. pl. 5. Mich. 29 & 30 Eliz. Millington v. Burges.

17. A. and B. made a joint contract with C. and A. alone brought the action. This was argued not to be the same contract, and that so the defendant might wage his law. And of this opinion was the Court, absente Anderson. Goldsb. 75. pl. 4. Hill. 30 Eliz. Bostock's Case.

So whereupon examination it was found, that the defendant was indebted to the

plaintiff 10 l. to be paid at Christmas, and that upon communication between them, it was agreed, that the defendant should then pay to the plaintiff 5 l. in satisfaction of all the debt, and as to the other 5 l. that he should be acquitted of it; the justices were clear of opinion, that the defendant ought not to be admitted to wage his law; for notwithstanding that bare communication, the whole debt remained due, not extinguished by the communication; for 5 l. cannot be a satisfaction for 10 l. but contrary of a collateral thing in recompence of it &c. * and satisfaction. But agreement to pay 5 l. before the said Christmas in satisfaction of the whole 10 l. [there] upon such matter shewed, the Court was of opinion, that the defendant might be admitted to wage his law. 4 Le. 81. Mich. 30 Eliz. C. B. Anon.——* Orig. is (and satisfaction and agreement to pay &c.)

S. C. cited
per Holt Ch.
J. 12 Mod.
684.

19. Wager of law was denied in *debt for scavage* arising by prescription, and that confirmed by act of parliament. Vent. 261. Trin. 26. Car. 2. B. R. Mayor &c. of London v. Dupester.——2 Lev. 106. S. C. by name of Mayor &c. of London v. Deputee.

20. Debt for a duty growing by a by-law; if the by-law be authorized by letters patents, no wager of law lies. Vent. 261. in Case of Mayor, &c. of London v. Dupester.

21. So in case for *toll* granted by letters patents. Vent. 261. In action of debt for toll by prescription, you cannot wage your law; per Hale Ch. J. who asked if they could shew a precedent where a man can wage his law in an action brought upon a prescription for a duty. Mod. 121. pl. 26. Trin. 26 Car. B. R. Anon.

(M. 2) In what Cases it lies, and the Reason thereof. See Gift.

1. **WAGER** of law is allowable in five cases. 1st. In debt upon simple contract, which is the common case. 2d. In debt upon an award upon a parol submission. 3d. In an account against a receiver for receipts by his own hands. 4th. In *detinue*, though the bailment were by the hands of another. 5th. In an *amerciament* in a Court-Baron or other inferior Courts not of record; and in every of these instances, the action is grounded upon a feeble foundation; and of small consideration in law; per Hatfell J. 12 Mod. 670. in Case of the City of London v. Wood.

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2. In no case where a * contempt, trespass, deceit or † injury is supposed in the defendant, he shall wage his law; because the law will not trust him with an oath to discharge himself in those cases; but in some cases, as debt, *detinue*, account, the defendant is allowed by law to wage his law. Co. Litt. 295. a.

* S. P. Raym. 286.
† Where there is a contempt in the defendant, he

ought not to be allowed to swear it off; per Hatfell J. 12 Mod. 672.

3. The reason wherefore in an action of debt upon a simple contract, the defendant may wage his law, is, for that the defendant may satisfy the party in * secret, or before witness, and all the witnesses may die, so the law doth allow him to wage his law for his discharge; and this, for ought I could ever read, is peculiar to the law of England, and no mischief issueth hereupon; for the plaintiff may take a bill or bond for his money; or if it be a simple contract, he may bring his action upon his case upon his agreement or promise, which every contract executory implieth, and then the defendant cannot wage his law. 2 Inst. 45.

* S. P. Sci. 199. per Roll. Ch. J. Hill. 1649. B. R. Hodges v. Jane.

4. The only true reason of wager of law, is the *inconsiderableness* of the ground of the plaintiff's demand, and it suffices that the nature of the defendant's discharge be of equal validity with the ground of the plaintiff's charge; per Hatfel J. 12 Mod. 670. in Case of the City of London v. Wood.

5. Originally it was not only a privilege of the defendant to discharge himself, but one which the plaintiff had when he had no witness of his debt, to put the defendant under the necessity of giving him his oath to discharge him; so it was a kind of an equity in law, that the plaintiff might put him to take his oath that he owed nothing to him, or confess the debt, rather than the

the plaintiff should lose his debt, in cases where he had no witnesses of it at all, or had some who were then dead; per Holt Ch. J. 12 Mod. 678. in Case of City of London v. Wood.—Cites Magna Charta, c. 28.

6. If *summons in præcipe quod reddat* be not served 15 days before the first day of the return of the writ, the tenant may wage his law of non summons; for 15 days before the fourth day of the return will not serve. Br. Ley Gager, pl. 57. cites 24 E. 3. 46.

7. Debt against a bailiff upon arrears of account, and the defendant pleaded that he owed him nothing, and that he was ready to make by his law, and had the law; for he was not to account before auditors; quod nota. Br. Ley Gager, pl. 15. cites 43 E. 3. 1.

And per Belk. the voucher in præcipe quod reddat shall not wage his law, that he

was summoned upon the summons; for he need not save his default at the grand cape ad valentiam; but if he be returned summoned, where he was not summoned, and after grand cape ad valentiam issues, he shall have disceit of the return &c. Ibid.

So where a man, who is able to live of his land, and not compellable to serve, be retained in husbandry, in debt for his salary, [75]

the defendant shall not wage his law; and it was agreed, that if a * priest, gentleman, yeoman, cook, butler, and the like, who are not compellable to serve, are retained in their degrees or offices, and bring debt for their salary, the defendant may wage his law, and contra if they are retained in husbandry; note the diversity; by which the defendant said, that he did not retain him in husbandry; and a good plea; and the other said, that he did retain him modo & forma, and a good replication, though he did not say in husbandry; for it shall have respect to the declaration, and so good issue. Ibid.—Br. Laborers, pl. 46. cites S. C.—* S. P. Br. Ley Gager, pl. 70. cites 39 H. 6. 18.

10. In *detinue*; if a man delivers to me goods in satisfaction of a debt, and after brings *detinue* thereof, the defendant may wage his law; for the property is changed. Br. Ley Gager, pl. 78. cites 22 E. 4. 2.

11. A man may wage his law of *non-summons in re-summons*, as well as he may in the original; per Brian and Chock; but per Catesby contra. Quære; and the writ was returnable 15 Trin. and the summoners summoned him about the 15th of Corpus Christi; and therefore, per Chocke, he may wage his law of non-summons, that he was not summoned according to the law of the land; for the law is, that he shall be resummoned by the day in

in the writ; but Catesby said, that he cannot wage his law here by conscience, nor can he wage his law in re-summons. Br. Ley Gager, pl. 103. cites 1 E. 5. 2.

12 Debt of 40s. upon the statute of cappers; the defendant tendered his law; and per Cur. he shall not have his law, in as much as the *action is founded upon the statute*. Br. Ley Gager, pl. 106. cites 10 H. 7. 18.

So in debt against W. C. for scavage taken against the statute of

19 H. 7. which wills that none shall take scavage against the form of the statute, upon pain of 20 l. the defendant pleaded nihil debet per patriam, but did not tender his law. Br. Ley Gager, pl. 63. cites 21 H. 7, 14. — In debt upon a penalty given by statute, the defendant shall not wage his law. Co. Litt. 295. a.

13. If the *tenant, at the day of the return of the grand cape*, appears and tenders his law of *non-summons*, and the *sheriff does not return the writ*, yet he may make his law; for he has a day by the roll. Quod nota. Br. Ley Gager, pl. 2. cites 27 H. 8. 14.

14. In *detinue of twenty quarters of wheat*; the plaintiff counts simply of a contract for the wheat &c. The defendant pleads, that the plaintiff bought of him eighty quarters, upon condition to pay for it as he came for it, and otherwise to be void; and said, that the plaintiff had received thirty quarters, and paid for it, but at another day he received ten quarters, which he had not paid for, and so the contract void. Judgment if action. It was agreed, that defendant might wage his law, or say if he will, Non detinet per patriam. D. 29. b. 30. pl. 201. Hill. 28 H. 8. Anon.

15. In debt the plaintiff declared upon a *sale of some wood for 20 l.* The defendant pleaded *nil debet &c.* and upon the evidence it appeared, that the *bargain was for twenty marks*; the Court directed the jury to find for the defendant, because it cannot be intended one and the same contract; and that in this case the defendant might have waged his law, though he had pleaded non debet the 20 l. nec aliquem inde denarium. 3 Nels. Abr. 516. pl. 2. cites Mich. 5 Eliz. Dyer. 219.

The case is in D. 219. b. pl. 11. Mich. 4 & 5 Eliz. and stated as here; and by the opinion of Catlyn Ch. J. and Browne J. the ver-

dict shall be for the defendant in this case, as in case of a variance of the contract of the things sold, according to the 21 E. 4. in as much as it cannot be intended one and the same contract. But then the book says, Quære if there be not some diversity, in as much as the *plea is non debet the sum nec aliquem denarium inde in forma qua &c.* Unde in *detinue* 22 E. 4. of a chain containing three ounces, and in truth it contained but two, yet the defendant might safely wage his law; otherwise it is if the variance be only in the price or value.

16. There is no act of parliament in express words, which takes away wager of law in action of debt upon arrearages of account; but at the common law the defendant shall have his law in action of debt, brought upon arrearages of account, be the account before one or several auditors, as appears in 38 H. 6. f. 6. a. But the reason why the defendant shall not wage his law when the account is made before auditors, is upon the statute W. 2. cap. 11. For now this statute has made the auditors judges of record, because they are impowered thereby to commit the defendant to prison, which none can do but judges of record, and for

for that reason, viz. that they are Judges of Record. 10 Repl
103. a. in a note of the Reporter, in Denbawd's Case.

17. Two men were *partners* in goods; the *one* of the partners sold unto J. S. at several times, goods to the value of 100 l. and for the goods at one time bought he paid the money according to the time; afterwards an action was brought by one of the partners, for the rest of the money, and the plaintiff declared upon one contract for the whole goods, whereas in truth they were sold upon several contracts made, and the defendant in that case would have waged his law; but the Court advised the plaintiff to be nonsuited, and to bring a new action, because that action was not well brought; for it ought to be a several action upon the several contracts. Brownl. 244. Hill. 11 Jac. C. B. Lambert's Case.

18. In action against B. plaintiff declared upon the custom of merchants *for a bill of exchange* drawn by a factor of the company's agent beyond sea for money paid, and indorsed here by one of the company. Hobart Ch. J. thought the defendant ought to be admitted to wage his law; for the delivery of the money made a contract in law, and as he may have an action of debt, so without question he may have an action upon the case, and so count upon a promise, and then the defendant may not wage his law. Winch. 24. Mich. 19 Jac. Vanheath v. Turner.

19. An action of debt was brought against one for 50 l. due for divers pieces of *linen cloth sold* to the defendant. The defendant was ready at the bar to wage his law; but the Court being informed that the *defendant's wife kept a shop, and used to buy and sell by her husband's privity and allowance, and that these parcels of cloth were bought by her to furnish her shop*, and that the defendant her husband, although he was a seaman, and meddled not in buying and selling of any of the wares in the shop, yet his wife did it by his allowance, Roll. Ch. J. advised the defendant to take heed he waged not his law; for that he could not do it with a good conscience, because his allowance of his wife's buying the wares was all one, as if he bought them himself, and counselled him to plead, to which the defendant consented, and the ley gager was *waived by consent* of the parties, and an imparlance given till the next term. Sti. 322. Pasch. 1652. B. R. Anon.

* It is a note of the Reporter. 4 Rep. 95. b.

20. Wager of law lies not *in quo minus*, because the *King's revenue* is remotely concerned, upon suggestion, that the plaintiff is indebted to the King, and less able to pay him by the defendant's detainer of his debt. Per Hatfield J. said, it was given as a * reason. 4 Rep. in Slade's Case. 12 Mod. 671. in Case of City of London v. Wood.

The secrecy of the contract, which raises the

21. Where the *matters charged are facts notoriously known*, in such case there are no precedents of wagers of law. Per Hatfield J. 12 Mod. 671.—Per Holt Ch. J. Ibid. 682.

debt,

debt, is the reason of the wager of law; but if the debt arise from a contract that is notorious, there shall be no wager of law. Per Holt Ch. J. 12 Mod. 679. in Case of City of London v. Wood. —In debt upon a contract for a sum in gross, wager of law will lie; but if debt be brought for rent due upon a parcel lease, it will not lie; and the reason is, because it is in the realty, and arises from the taking the profits of the land, and occupation of it in the country, and so the notoriety of the thing excludes the defendant from waging his law. Per Holt Ch. J. 12 Mod. 681. in Case of City of London v. Wood.

22. The very custom of London excludes wager of law in some actions, as in debt for diet, 1 Ed. 4. 6. Bro. Examination, 18. the Statute of 38 Ed. 3. 5. before which no wager of law could be against a Londoner. Per Hatfield J. 12 Mod. 671. cites Br. Ley Gager, 94.

23. A prescription prevents wager of law, and no man can deny it upon oath. Per Holt Ch. J. 12 Mod. 683. in Case of City of London v. Wood.

(M. 3) In what Cases Defendant may be compelled to wage his Law. [77]

1. **I**N 33 H. 6. 8. In a *precipe quod reddat*, the tenant made default, but appeared on the return of the great capias, and pleaded non-summons, and would conclude to the country, where the proper trial was, by wager of law of non-summons; and the question there was, if he could waive his plea of wager of law, and betake himself to plea concluding to the country? and the better opinion there is, that he could not put himself upon his country, and decline his wager of law; and that case is plainly out of the statute of Magna Charta, because it is not debt, nor simplex loquela, but a process of non-summons, from which he was to save himself. Per Holt Ch. J. 12 Mod. 679. in Case of City of London v. Wood.

2. In London there is a custom, that if the defendant thinks that the plaintiff has made a false declaration in debt, he may pray that the plaintiff may be sworn, whether his declaration be true, and he shall have it; and if he swears, the defendant shall be by this condemned, and if he refuses it the plaintiff shall be barred, for it is peremptory. Br. Ley Gager, pl. 77. cites 21 E. 4. 44.

3. Plaintiff, on bringing convenient proof, and averring Magna Charta, may compel the defendant to wage his law. Per Holt Ch. J. 12 Mod. 679. in Case of City of London v. Wood.

(M. 4) In what Cases, and the *Effect*, where there are *two Defendants*, and *one does*, or tenders his Law, and the *other makes Default* at the Day.

S. P. Br. Ley Gager, pl. 38. cites 38 E. 2. 27. But where in debt against two, they pleaded nihil debent, and upon that they wage their law, and a day given &c. One came at the day, and the other made default. He

that appeared prayed to do his law, and it was denied; for the declaration and plea, and wager of law, were all joint, and the default of one now is the default of both. Noy. 111. Stacey v. Slane.

Cessavit against three who waged their law of non-summons at the grand cape, and at the day two appeared ready &c. and the 3d made default, and upon argu-

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ment &c. the two waged their law, and the writ abated for two parts, * and was received for the third part, in default of the third, and so the writ stood for the third part. Br. Ley Gager, pl. 23. cites 48 E. 3. 13. — * Orig. is (et un fuit rescive pur le tierce part &c.)

1. *DEBT* against two who waged their law, and at the day the one came and made his law, and the other made default, by which it was awarded, that the plaintiff take nothing by his writ; for the contract is now destroyed; but per Thorp, the plaintiff, before the law made by the defendant, might have condemned both by default of the other at the day of the law; quære inde. And per Candish and Finch. it is no mischief to the plaintiff, for he may have debt against the other alone, and it is taken there that the writ shall abate only; quod mirum! for it seems that the ley gager is a bar. But it was agreed, that in debt upon obligation against two, who plead non est factum, and it is found the deed of the one, and not the deed of the other, the plaintiff shall recover against him who is convict; quod nota. Br. Ley Gager, pl. 12. cites 40 E. 3. 35.

2. Cessavit against three, who at the grand cape waged their law of non-summons, and at the day two made default, and the third appeared and tendered the arrears by statute before judgment, and could not but for the third part; wherefore he prayed to be received of two parts, and so see where they failed their law, viz. where some do not come, the other shall not make his law for this part, as it seems, quære inde; and if the third could not have performed his law, for his part, in an action real, and save his part, the demandant should recover two parts by default of the two; it seems that he shall, but his intent was to save the intire land. Br. Ley Gager, pl. 13. cites 40 E. 3. 40.

3. *Præcipe* quod reddat against two, who made default, by which grand cape issued, and the one made default, and the other appeared and took the intire tenancy, absque hoc that the other had any thing, and tendered his law of non-summons, and the plaintiff maintained his writ, that they hold as the writ supposed; Prist; quod nota. Br. Ley Gager, pl. 21. cites 47 E. 3. 14.

(M. 5) In what Cases, and the Effect. *Abatement of Writ.*

1. *PRÆCIPERE* quod reddat against baron and feme, and the baron came in proper person and profered his law, and the feme by attorney, and the law was accepted, and the writ abated, and ill per Thorp and Cur. quod nota; and so see, that by ley gager of non-summons, the writ shall abate; and yet upon return of tarde, or that the demandant non invenit plegios de prosequendo, the Court shall award summons sicut alias. Note a diversity. Br. Ley Gager, pl. 18. cites 44 E. 3. 38. See (R)

2. Debt against executors of the debt of the testator for eating and drinking; and because the testator might have waged his law, the writ was abated. Br. Ley Gager, pl. 55. cites 15 E. 4. 16.

(M. 6) In what Cases, and the Effect; though he might traverse &c.

1. **I**N debt of a loan to the predecessor, which came to the use of the house, the abbot may traverse the mesne conveyance that he did not * borrow, and yet he may wage his law. Br. Ley Gager, pl. 76. cites 13 E. 4. 4. So in debt upon arbitrement, the defendant may traverse the arbitrement, and yet may wage his law. Ibid. — Br. Ley Gager, pl. 94. cites 21 E. 4. 45. contra; that the defendant in detinue, debt &c. shall not be permitted to traverse the mesne conveyance where he may wage his law, unless in special cases. — * Orig. (Apprompta.)

(M. 7) How, of Part.

1. **I**N debt the plaintiff counted part upon arbitrement, and part upon arrears of account, and as to the arbitrement the defendant made his law immediately, and to the residue tendered his law, and prayed that the plaintiff be examined, and the attorney would not be examined; wherefore it was awarded that the defendant have his law, and upon this he was ready to make his law immediately; and because he, upon the first tender of his law, did not pray to make it immediately, therefore he was ousted of making of it now; per Cur. and was put to a day; quod nota: Per tot. Cur. Br. Ley Gager, pl. 19. cites 33 H. 6. 24.

2. In debt upon buying of a horse, the defendant shall not be received to wage his law of parcel, and of parcel plead to the country, because a trial may make an end of all. But if it be upon such buying for 20 s. the defendant may say that he bought it for 10 s. absque hoc, that he bought it for 20 s. and as to the

10 s. he may wage his law ; because the contract, for the manner of it, is not confessed ; per Frowike. But if he says, that as to 10 s. he tendered the money, and as to the other 10 s. wages his law, he said, that it is a doubt to him, because the contract is in a manner confessed. Vavisor agreed ; ideo quære. But it is commonly used to wage the law for parcel, and to make tender for parcel by attorney ; tamen dubito of the law &c. Kelw. 40. b. pl. 5. Mich. 17 H. 7.

3. In account against one as receiver, he counted of a receipt of diverse sums, some by his own hands, and some by other hands ; the defendant, as to the sums, [charged to be received] by the proper hands of the plaintiff said, that *ne unques receiver &c. Prist*, to make his law ; and of the residue pleaded to the country, and day given till another term ; at which day the defendant, for part of the sums of which he had pleaded his law, would have waived his law, and confessed the action of it, and of the residue he would have performed his law ; and whether he might do it without the assent of the plaintiff, the Court much doubted ; but by the advice of the Court, he waived all his plea of the law, with the consent of the plaintiff, and pleaded to the country *ne unques son receiver to render account*, Prist ; and had it, therefore quære legem. But after, in this term, by the opinion of the Court, except Harper, he could not have the confession allowed. D. 265. a. pl. 2. Mich. 9 & 10 Eliz. Anon.

4. In debt brought upon a contract, the defendant cannot wage his law for part, and confess judgment for the other part ; per Hobart Ch. J. who said, it had been so adjudged Mich. 15 Jac. in C. B. And it was said to have been so adjudged upon a shop-book, in CART's Case, and cited 38 H. 6. 14. If the law lies not for parcel, then it suspended for the whole, where the debt is an *entire debt* ; and so it was adjudged in the principal case here. Godb. 327. pl. 420. Pasch. 21 Jac. C. B. Anon.

5. In an action of debt where the defendant may wage his law, if he confesses part of the debt, and wages his law of the residue, and a judgment is given and entered for the plaintiff for that which is confessed ; after this judgment the plaintiff cannot be nonsuited as to the residue ; but he ought to appear when the defendant comes to wage his law for this part of the debt. Bulf. 194. Pasch. 10 Jac. Anon.

(N.) *Examination of the Plaintiff.* In what Cases the Defendant may pray that Plaintiff, or his Attorney, be examined.

If before
this statute
a man had
entered into

1. 5 H. 4. *TO* eschew mischiefs which be as well within London
c. 8. as other places, of that diverse fained suits of debt
have been taken by the people of the said places against diverse people,
surmising

surmising that they have accounted before their apprentices, and sometimes other their servants, auditors assigned, of diverse receipts, duties, and contracts, had betwixt them, and that they were found in arrearages upon the account in diverse great sums, where there was never receipt nor duty betwixt such parties, to the intent to make them against whom such suits were taken, to put them in inquest, and to put them from the waging of their law; the judges before whom such actions shall be sued in cities and boroughs, shall have power to examine the attornies, and others, and thereupon to receive the defendants to their law, or to try the same by inquest after the discretion of the judges.

an account before two auditors for a thing which lay not in account, and they found him indebted, upon which the other brought writ of debt against him,

it was no plea for the defendant, that the matter lay not in account; for it was his folly to enter into the account; and so at the common law the defendant was without remedy; but now, by this statute he may tender his law, and pray that the party be examined, whether it lies in account or not, and if it be found that it does not, the defendant shall make his law and go his way; but by the common law, the defendant ought to answer to the debt, which is the end of the account, and the judgment of the auditors, and the matter of account, is only conveyance. Per Frowike. Kelw. 82. b. pl. 3. Pasch. 21 H. 7. — It seems by the meaning of this statute of the examination of the attorney of the plaintiff in debt upon arrearages of account before auditors, *that wager of law does not lie, but that nihil debet per patriam* shall be received in debt upon arrearages of account before auditors. E contra, 50 E. 3. against gaoler, for escape of one condemned before auditors assigned, D. 145. pl. 63. Pasch. 3 & 4 P. and M. Wife's Case.

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2. Debt upon arrears of account; defendant prayed that the plaintiff's attorney be examined if the matter lies in account, and so he was, notwithstanding that no issue was tendered; and upon the examination of the attorney, it appeared that it was for *stuff bought by the defendant of the plaintiff*, by which he tendered his law and was admitted; quod nota. *Mirum of the examination before law tendered*, Br. Examination, pl. 15, cites 14 H. 4. 19.

If the attorney refuses to be examined the defendant shall be admitted to his law. Br. Examination, pl. 33. cites 33 H. 6. 26.

3. Debt by two executors and counted of arrears of account made in the time of their testator, and the defendant tendered his law, that he owed them nothing, and prayed that they be examined, and the opinion of the Court was that they shall not be examined of another's deed; *contra of attorney*; for he may have information of his master &c. And the cause of this examination given by the statute is, that if it be found upon examination of the party upon a book *that the matter does not lie in account*, then the law lies; and so this case is out of the case of the statute of examinations, by the opinion of the Court. Br. Examination, pl. 5. cites 3 H. 6. 46.

S. P. Br. Examination, pl. 6. cites 9 H. 6. 8. — S. P. Ibid. pl. 7. cites 9 H. 6. 58. — Where executors bring action, or where action is brought against them, exam-

ination does not lie; for this is to have the *lex gager*, and executors cannot wage their law. Br. Examination, pl. 22. cites 20 E. 4. 3. per Brian and Littleton. — *Debt by an executor upon arrears of account before auditors in the time of the testator*, the defendant tendered his law and prayed that the plaintiff be examined, and the executor was examined, though it was of another's deed, but not precisely, whether he saw or heard the account, or was present at it; but whether any matter which proves that it lay in account came to his hands, and of other points at the discretion of the justices, but not of the truth of the deed precisely, and upon the examination it was awarded, that the defendant answer without his law; quod nota. Br. Examination, pl. 19. cites 21 H. 6. 54, 55. — But if such action was brought against an executor the plaintiff shall be examined. Ibid.

6 Rep. 53.
cites S. C.
and that as to
what Rolfe
Serjeant said,
Cocke in
who gave the rule said, that the law will have a diversity between a lord or lady &c. and other common persons.

4. If a *dame* or *peer of the realm* brings debts upon arrears of account, they shall be examined; per Rolf, for the statute is general; but Cockine contra. Br. Examination, pl. 25. cites 3 H. 6. 48.

5. In *debt by executors of arrears of account before auditors assigned by their testator* the defendant said, that he owed him nothing modo & forma, Prist by his law; and prayed that the plaintiffs be examined; and because they shall not be examined of another's deed, they *demand of the attorney without oath of the truth, who said that it is the truth as he is informed*, [therefore] Newton [ruled the defendant to] *answer without the law*; nota. Br. Examination, pl. 17. cites 19 H. 6. 35.

Br. Ley
Gager, pl.
84. cites S.
C.—Br. Ex-
amination,
pl. 11. cites
S. C.

6. In *debt upon arrears of account*, the defendant may wage his law, quod nihil debet &c. and pray that the plaintiff be examined if the matter lies in account or not; and if it appears by the examination that it does not lie in account he shall have his law, and otherwise not; and the party or his attorney shall be sworn to say the truth, and every examination is upon oath as here. Br. Examination, pl. 32. cites 35 H. 6. 5.

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7. In *debt upon arrears of account* the defendant tendered his law, and prayed that the plaintiff be examined if it lies in account, and so it was; and the matter was, that the defendant was in debt to a stranger for farming of tenths, and E. was indebted to the plaintiff in such a sum, and the said E. assigned the defendant to pay the plaintiff, and the defendant said that he had made certain payments of tenths, and prayed to reckon of them, and then he would pay to the plaintiff that which remained, by which the plaintiff assigned to him two persons to hear his account, and upon this the defendant was found in arrears of the sum in demand, and by the best opinion this matter lies not in account, for the defendant was not accountable to the plaintiff. Br. Ley Gager, pl. 73. cites 5 E. 4. 140.

8. *Debt upon an obligation*, the defendant said that it was made beyond sea, and prayed that the plaintiff may be examined, and it was denied, per Cur. for it was said that because it bore date at large without place certain it is sufficient, though it was made at Rome or other place, and may be alledged to be made here. Br. Examination, pl. 31. cites 21 E. 4. 74.

(N. 2) Ousted in what Cases by Examination of the Plaintiff.

Br. Peremp-
tory, pl. 16.
cites S. C.

1. **D E B T** upon arrears of account, the defendant tendered his law and prayed that the plaintiff be examined, and so he was, and said upon oath that it is as he has counted, by which the defendant

defendant was compelled to answer without his law. And so see that where the defendant prays that the plaintiff be examined or sworn, this is peremptory to the plaintiff in this point, and so is the ley gager of the part of the defendant, and so is the oath of the plaintiff in London by the custom, where [if] the defendant prays that the plaintiff shew his declaration and he does so, there the defendant by this shall be condemned. Br. Examination, pl. 18. cites 19 H. 6. 43.

(O) The Manner of doing it.

1. *Magna Charta*, *NO bailiff shall put any man to his open law, or to an oath upon his own bare saying, without faithful witnesses brought in for the same.* Ley Gager shall be made by 12 viz. 11 and himself shall

be sworn. Br. Ley Gager, pl. 9. cites 33 H. 6. 8. — 2 Inst. 45. — He ought to bring with him 11 persons of his neighbours that will avow upon their oath, that in their consciences he saith truth; so as he himself must be sworn *de fidelitate*, and the 11 *de credulitate*. Co. Litt. 295. a. — S. P. But they may be dispensed with by the plaintiff's assent. Vent. 4. Hill. 20 & 21 Car. 1. B. R. Anon. — They may be less than 11. 2 Vent. 171. Pasch. 2. W. & M. C. B. Anon.

2. *Præcipe quod reddat against baron and feme and a third, who waged their law of non-summors, and the third appeared to be within age; wherefore upon oath of the baron and feme, that he was the same person they two waged their law only without more hands, and the writ abated; quod nota.* Br. Ley Gager, pl. 37. cites 38 E. 3. 8. — But refers to lib. Int. 42. of Wager of Law by 12 hands, and New Book of Entries fo. 389.

3. When a Lumbard &c. wages his law, and cannot speak English nor Latin, the record shall be read to him in his own language, and so he shall perform the law; quod nota. Br. Ley Gager, pl. 49. cites 21 H. 6. 42. Co. Litt. 295. a. S. P.

4. *Debt against baron and feme of the debt of the feme; before the count they waged their law, and the feme was not permitted to make her law alone, but she and the baron together.* Br. Ley Gager, pl. 53. cites 15 E. 4. 2. Co. Litt. 159. a. S. P. — S. P. Br. Ley Gager, pl. 59. cites 9 E. 4. 24.

for the baron is debtor by the marriage.

5. The defendant was set at the right corner of the bar, without the bar, and the secondary asked him, if he was ready to wage his law? he answered, yes; then he laid his hand upon the book, and * then the plaintiff was called; and a question thereupon arose, whether the plaintiff was demandable; and a diversity taken where he perfects his law instanter, and where a day is given in the same term, and when in another term; as to the last, they held he was demandable, whether the day given was in the same term or another; then the Court admonished him, and also his compurgators, which they regarded not so much

* When the defendant has his hand on the book before he is sworn the plaintiff is to be called and he may be nonsuited. 2 Vent. 171. Anon. —

+ S. P. 2
Inst. 45.

much as to desist from it; accordingly the + defendant was sworn, that he owed not the money modo & forma, as the plaintiff had declared, nor any penny thereof; then his compurgators standing behind him, were called over, and each held up his right hand, and then laid their hands upon the book, and swore, that they believed what the defendant swore was true. 2 Salk. 682. Trin. 11 W. 3. B. R. Anon.

(P) At what Time.

1. *P R A E C I P E* quod reddat; the tenant came at the grand cape and waged his law of non-summons, and at the day, &c. came to make his law, and the demandant offered to wave the default, and prayed that the tenant may plead in chief; per Finch. you cannot do so unless the tenant will consent to it; and the tenant was thereof demanded, and would not consent, wherefore he waged his law, and the demandant took nothing by his writ; but at the first day when the tenant offered his law, the demandant might have released the default as it seems. Br. Ley Gager, pl. 82. cites 42 E. 3. 7.

Br. Nonsuit, pl. 10. cites S. C. and that the * plaintiff absented himself and was not suffered to become nonsuit. But Brook says, that if he

had imparled to the law, and so to have been nonsuited, it seems to him that such imparlance ought to be to another term.——* This is (defendant) in all the editions of Brook, both at Ley Gager, pl. 85. and at Nonsuit pl. 10. but it should be plaintiff as here.

3. In debt, the defendant tendered his law and had a day &c. and at the day the plaintiff was essoigned, and at the day the defendant was essoigned &c. and at the day the plaintiff was essoigned again, and therefore the defendant went quit by judgment without making his law. Br. Ley Gager, pl. 36. cites 9 H. 5. 5.

4. In debt the defendant tendered his law, and the plaintiff imparled to a day in the same term; there the plaintiff shall not be demanded nor be nonsuited; for his appearance was of record the same term, and if he refuses the law he shall be barred. Br. Ley Gager, pl. 96. cites 3 H. 6. 49.

Br. Jour. pl. 28. cites S. C.

5. Debt upon arbitrement the defendant imparled, and came back the same term, and tendered his law; and per cur. he shall have his law. Br. Ley Gager, pl. 41. cites 8 H. 6. 10.

6. In *præcipe* quod reddat; essoign is cast for the tenant at the summons returned, and by his default grand cape issued; there he cannot wage his law of non-summons at the day, unless he surmises that the essoign was not cast by him; quod nota. Br. Ley Gager,

Gager, pl. 90. cites 36 H. 6. 23. And see 10 H. 6. 9. that if he had so furnished he might wage his law. Ibid.

7. In *detinue*, the defendant pleaded in bar, and after relinquished it and waged his law, and well; for a man may relinquish his plea and plead the general issue, and this shall be before the plea entered. Br. Pleadings, pl. 119. cites 2 E. 4. 13.

8. In debt the defendant waged his law, and when he came to perform it the plaintiff said, that he who now came is another of the same name, for his action is against J. S. the elder, and he who now appears is J. S. the younger, and prayed his judgment; quære, for the averment was not granted nor denied. Br. Ley Gager, pl. 91. cites 5 E. 4. 5.

9. In debt, the defendant had day given to wage his law, and at the day defendant was sick of a burning fever, whereupon the Court was moved for another day for the defendant to come and wage his law, and offered to make all this good by an affidavit; but the Court refused, and advised him to plead to the country, and so he did. 3 Buls. 263. Mich. 14 Jac. Smink v. Barker.

Roll. R. 430. S. C. by name of Spink v. Baker.

10. Day given for waging of law is peremptory; per three [83] justices against one. 3 Buls. 316.

And the defendant cannot afterwards waive it without the plaintiff's consent, and betake himself to the country, and upon his non-appearance a *defect de lege* was entered. Buls. 186. Pasch. 10 Jac. Harrison v. James.—

After the roll was marked with a *defect de lege*, and costs assessed, it was moved and prayed, *sedentes Curia*, that he might be demanded again, and it was granted, and then defendant made his law. Noy. 42. Anop.

11. In debt by assignees of commissioners of bankrupts, defendant came in and waged his law *instanter*, and it was debated if the plaintiff might be nonsuited; and at length it was agreed in as much as the defendant came *instanter*, that the plaintiff cannot be nonsuited; for which reason the plaintiff was not called, but the defendant waged his law; and after he had sworn they demanded his compurgators, and then the officers, viz. criers and book-keepers, &c. and they came and said, ready [or here] but they were not sworn but accepted, and so the plaintiff barred. Sid. 366. Trin. 20 Car. 2. B. R. Buckeridge v. Brown.

The reporter says, vide that when defendant comes *instanter* to wage his law, or at another day in the same term, to which the plaintiff has imparled, the plaintiff shall not be demanded nor can be nonsuited. Ibid. cites 14 H. 4. 19. b. 3 H. 6. 50. a.

(Q) In one Action, where a Bar in another.

1. **ACCOUNT** against A. of goods delivered to him to merchandise, the defendant said, that the plaintiff at another time brought writ of *detinue* against the defendant of the same goods, and counted upon a bailment to re-bail, in which the defendant waged his law, and made the law, judgment; and a good plea in bar, per Brian Ch. J. but Catesby J. contra, and that it is only an estoppel. Br. Barre, pl. 92. cites * 2 R. 3. 14.

* Br. Estoppel, pl. 217. cites S. C. acc. and Br. Ley Gager, pl. 80. cites S. C. acc. S. P. ibid. pl. 101. cites 2 R. 3. 19.

per Brian, but Catesby contra.—S. P. ibid. pl. 108. cites 12 E. 4. by 2 Justices that it is a good bar, 2. If

S. P. Br.
action, sur
le Case, pl.
110. cites
2 R. 3.

2. If a man brings *debt of 10 l.* and the *defendant wages his law*, and after the *plaintiff brings action upon the case against the same defendant that he promised to pay the 10 l. &c.* The defendant may plead that of the same sum the plaintiff at another time brought action of debt in which the defendant waged his law, judgment si actio: and a good plea, for he was once barred of the same sum. Br. Action sur le Case, pl. 105. cites 33 H. 8.

(R) Failer. What.

Br. Judg-
ment, pl. 8.
cites S. C.

1. **I**N *debt* it was adjudged a failure of the law, where the *defendant came at the capias in ward of the sheriff and waged his law*, and it was by *mainprise*, and at the day was *essoigned*; for *essoign* does not lie for him who is by *mainprise*. Br. Ley Gager, pl. 16. cites 44 E. 3. 12.

(S) *Estoppel*. What Plea Defendant may plead after he had done his Law; or after what Plea he may wage his Law.

S. P. Br.
several te-
nancy, pl. 3.
cites 4 E. 3.
40.—And
per by +
42 E. 3. 16.
after such
Ley Gager

he pleaded *several tenancy*, quere diversity. Br. Estoppel, pl. 28.—* *Orig.* (tend lar).—+ S. C. cited Br. Several Tenancy, pl. 3.

[84]

So he may
plead non-
tenure and
shall not be
estopped, for
this comes

view; per Hank. quod conceditur. Br. Estoppel, pl. 54. cites 7 H. 4. 8.

2. *Præcipe quod reddat against one who waged his law of non-summons*, he shall not be by this estopped in another action to plead *jointenancy with another*; for he shall have the *view in another writ*, and by consequence shall plead *jointenancy*. Br. Estoppel, pl. 32. cites 42 E. 3. 11.

Wherefore
he said that
the first writ
was brought
against those
2 and others,
and those 2
took the
whole te-
nancy, ab-
sque hoc that
other 2 had
any thing,
and waged their law of non-summons by which his writ abated, and he brought this writ freshly against

3. *Præcipe quod reddat against two, the one took several tenancy of five acres, absque hoc, that the other had any thing, and vouched; and the other took the tenancy of the rest in severalty, and vouched another; Belk. said, to this you shall not be received; for at another time in such a writ against you, you waged your law of non-summons; & non allocatur per Cur.* For after Ley Gager of non-summons, the tenant shall have the view, and plead *jointenancy or several tenancy*, by which he was awarded to answer. Br. Estoppel, pl. 35. cites 42 E. 3. 16.

against

against these 2, judgment if they shall be received to take the tenancy in severalty, and by the opinion of the Court this is a good estoppel. Br. Ibid.—By which they took the whole tenancy in common, and the one vouched one, of that which belonged to him, and the other vouched another, of that which belonged to him, and the demandant demurred; quære, because it is not adjudged there. Br. Ibid.—S. P. Br. Several Tenancy, pl. 6. cites S. C.

4. In cessavit, a man is summoned in other land than is in demand, there if he makes default, and grand cape issues, he may wage his law of non-summons, but he shall not say for plea that he was summoned in other land, note a difference; for in whatsoever land he be summoned if he appears it suffices. Br. Ley Gager, pl. 60. cites 37 H. 6. 26.

5. Debt against B. The writ is abated, because the contract was by him and one C. who is alive not named, and after C. died, and in a new action against B. he waged his law, notwithstanding the confession of the contract before; for it may be, that he had paid after, &c. Br. Ley Gager, pl. 59. cites 9 E. 4. 24. Br. Brief, pl. 217. cites S. C. Br. Estoppel, pl. 97. cites S. C.

6. General Ley Gager by the one of non-summons in praece against two, shall be estoppel in a new action to say, that he is tenant with a stranger, and that the other had nothing. Br. Estoppel, pl. 167. cites 12 E. 4. 1. But where baron and feme, and the third waged their law of non-sum-

mons, in praece quod reddat, by this the feme was received after in another action, nor was estopped to say, that she and her baron are tenants, and the third had nothing. Br. Estoppel, pl. 181. cites 21 E. 3. 13.

For more of Ley Gager in general, see Non-suit, and other proper titles.

Libel.

(A) What is a Libel.

1. J. S. was libelled against, for incontineny, and A. B. C. and J. D. maliciously repeated a great part of it in the presence of several. They were censured for this in the Star-chamber, though there was no proof that C. and D. made the libel, or that they assented or were privies to the making of it. But saying that the libel is made of [such a] one, though he speaks it with malice, without repeating any part of it, is not punishable; nor to repeat part of it in merriment, without malice, or any purpose of defamation; and the Court held, that a libeller was punishable, though * Serjeant Hawkins says, that the reasonableness of this opinion may justly be questioned; for that [85] jests of this kind are not

to be en- though the *matter of the libel is true*. Mo. 627. Mich. 43 &
 dured, and 44 Eliz. in the Star-Chamber. Want's Case.
 the injury to the reputation of the party grieved, is no way lessened by the merriment of him that makes so light
 of it. Hawk. pl. c. 196. cap. 73. s. 14.

2. Every infamous libel either is *in writing, or without writing*. That *in writing* is, when an *epigram, rhithme, &c.* is composed or published to the contumely of another, by which his fame or dignity may be prejudiced. This may be *by words or ballads*.
 1. As where it is maliciously sung in the presence of others.
 2. By giving it over to another to scandalize the party. *Without writing, may be by pictures*, as painting him in an ignominious manner. 2. By *signs*, as fixing a gallows, &c. at his door or elsewhere. 5 Rep. 125. b. Pasch. 3 Jac. The Case de libellis famosis.

But had the letter been directed to the plainiff himself, and not to A. it should not have been a libel.— Ibid. 152. Or if it had been directed to a father for re-

3. A. being very old, and having a good estate, which he intended to settle on B. who was his heir-general, J. S. who had married a niece of A. wrote a letter to A. that B. was not the son of one of the name of A. and was a haunter of taverns, and that divers women followed him from London to his house, and desired to hear of A.'s death, and that all his estate would not pay his debts, &c. and signed it, and sent it sealed and directed to A. This was held to be a libel, and J. S. was fined 200l. and B. left at liberty to bring his action at law. 2 Brownl. 151. Pasch. 10 Jac. C. B. Peacock v. Sir Geo. Reynell.

formation of any acts of his children, it should be no libel; for it is only for reformation and not for defamation; for if a letter contain scandalous matter, and be directed to a third person, if it be reformatory, and for no respect to himself, it shall not be intended a libel; for the mind with which it was made is to be respected; as if one write to a father scandalous matter concerning his children, giving notice thereof to the father, and advising him to have better regard to them; this is only reformatory, without any respect of profit to him that wrote it; but in the principal case, the defendant intended his profit and his own benefit; and this was the difference. 2 Brownl. 152. in S. C.

So where A. sent a letter sealed up and delivered into B.'s hands, containing many ironical scandals, as saying, you will not play the jew nor the hypocrite, and so taunting him for an almshouse, and other good works done by him, all which he

4. A. wrote an infamous, scandalous &c. letter to B. and subscribed his name, and sealed and directed it, to his loving friend Mr. B. and added, Speed this. And after dispersed great numbers of copies. Resolved by Ld. C. Egerton, and the two Ch. J. and per tot. Cur. that the said letter, which in law is a libel, shall be punished, (though it was solely writ to the plaintiff himself without any publication) in the Star-Chamber; for it is a great offence to the King, and tends to breaking the peace, and therefore necessary to be punished by indictment, or in the Star-chamber; but the dispersing copies, or publishing the effect of it aggravates the offence; for which the party may have an action on the Case. 12 Rep. 35. Edwards v. Wootton.—In this Case Ld. Cook said, that a person libelling himself, is punishable by the civil law, and it seemed to him that he should be so in the Star-chamber. Ibid.

charged to have done for vain glory, but never published it; yet the Court fined the defendant, and sentenced him to wear papers, and to make his submission to B. in Cheapside. But an action of the Case will not lie in this case, for want of publication. However, the King and Commonwealth are interested

interested in it, because it is a provocation to a challenge and breach of the peace. Hob. 215. Pasch. 16 Jac. in the Star-Chamber. Sir Baptist Hicks's Case. — S. C. Poph. 139. and the Ld. C. Bacon said, that such private letter shall be punished, because that in a manner it inforces the party, to whom such letter is sent, to publish it to his friends for their advice, and for fear the other party should, so that this compulsory publication shall be deemed a publication in the delinquent. — And in an information for writing, &c. the country-parson's advice to the Ld. Keeper, it was held, that it lay for speaking ironically. And the Attorney General said, it was laid to be wrote ironice, and the defendant ought to have shewed at the trial, that he did not intend to scandalize them; and the jury are judges *quo animo* this was done, and they have found the ill intent. And judgment was given of the pillory, and a fine of 40 marks. 11 Mod. 86. Trin. 5 Annæ B. R. The Queen v. Dr. Brown.

5. A. made addressees to M. whom he afterwards married; [86]
one J. S. during the courtship, wrote a letter to M. advising her Lev. 139.
not to marry A. for that he is a debauchee, and has the pox, and is S. C.
not worth a groat, but has declared, that if he marries her, he will
allow 50 l. a year to a whore. This letter was not subscribed, but
conveyed to M. but it appeared upon evidence, that all this was
by J. S. but notwithstanding it was held a matter indictable.
Sid. 270. Trin. 17 Car. 2. B. R. The King v. Summer and
Hilliard.

6. The printing a charge of extortion in his office, against the
vicar general of the bishop of L. and delivering it to several members
of the committee of parliament for examination of grievances is justi-
fiable; but if he had delivered it to others it had been other-
wise; and the printing them, which is a publishing of them to
the printers and composers, is not so great a publication, as to
have so many copies transcribed by several clerks. Lev. 240.
Trin. 20 Car. 2. B. R. Lake v. King.

The matter
being again
at the bar,
Keeling and
Moreton in-
clined, that
the printing
was not jus-
tifiable, and
that the
committee

ought not to be informed by printing, or copies, but viva voce. Ibid. 241. Trin. 22 Car. 2. S. C.
But after in Mich. Term following, judgment was given for the defendant. Ibid. 241. S. C. —
Mod. 58. S. C. Trin. 22 Car. 2. but no judgment. — Sid. 414. Pasch. 21 Car. 2. S. C. but adjor-
natur. — Saund. 131. Hill. 19 & 20 Car. 2. S. C. and there 133, reports, that after this case had de-
pended 12 terms, judgment was given for the defendant by Hale Ch. J. Twisden and Rainsford upon
this point, viz. That it was the order and course of proceedings in parliament to print and deliver
copies, &c. of which they ought to take judicial notice. — S. C. cited Hawk. Pl. C. 194. cap. 73.
f. 8. And says it seems to be holden by some, That no want of jurisdiction in the Court, to which
such a complaint shall be exhibited, will make it a libel; because the mistake of the Court is not im-
putable to the party, but to his counsel. But if it shall manifestly appear, that a prosecution is in-
tensely false, malicious and groundless, and commenced, not with a design to go through with it, but
only to expose the defendant's character, under the shew of a legal proceeding, Serjeant Hawkins says,
he cannot see any reason why such a mockery of public justice should not rather aggravate the of-
fence, than make it cease to be one, and make such scandal a good ground of an indictment at the
suit of the King, as it makes the malice of their proceeding a good foundation of an action on the
the case at the suit of the party, whether the Court had a jurisdiction of the cause or not. Hawk.
Pl. C. 194, 195. cap. 73. f. 8. — But it seems that no presentment by a grand jury can amount to a
libel; because it would be of the utmost ill consequence any way to discourage them from making
their inquiries with that freedom which is necessary for the public good, by making them liable
to prosecutions on account of such inquiries. Hawk. Pl. C. Abr. 224. cap. 73. f. 7. but in the
book at large, it is f. 8.

7. C. forged an order of Chancery, in which were several de- 2 Show.
famatory expressions against the plaintiff, and at the end draws a 313. S. C.
pillory, and subscribes it for J. H. and his forsworn witnesses by
him suborned; this is but one complicated act, and an action
will lie. Skin. 123. Sir John Austin v. Col. Culpepper.

8. A. being chose church-warden, was tendered an oath ex
officio, viz. to present every parishioner, &c. some of which
articles

articles concerned A. himself, and was excommunicated for refusal; and thereupon had a prohibition, of which he caused 2000 to be printed in English, and dispersed them all over the kingdom, intitling them, a true translated copy of a writ of prohibition, granted by the Ld. Ch. J. and others, the justices of the Court of C. B. in Easter-Term 1676, against the bishop of C. who had proceeded against, and excommunicated, one T. W. a church-warden for refusing to take the oath usually tendered to persons in such office, by which writ the illegality of such oaths is declared, and the said bishop commanded to take off his excommunication. The Court declared this to be a most seditious libel, and gave order to enquire after the printer, that he might be prosecuted. 2 Mod. 118, 119. Mich. 28 Car. 2. C. B. Waterfield v. the Bishop of Chichester.

An action was brought by the husband for riding Skimmington; and adjudged it lay; because it made him ridiculous, and exposed him: per

9. In a special action on the case the plaintiff declares, that he is an hackney coachman, and the defendant, with intent to disgrace him, did ride *Skimmington*, and describes how, thereby surmising, that his wife had beat him, and by reason thereof persons, who formerly used him, refused to come into his coach, ad damnum. Upon not guilty, it was found for the plaintiff, and upon motion in arrest of judgment, judgment was quod querens nil capiat per billam. Raym. 401. Trin. 32 Car. 2. B. R. Mason v. Jennings.

[87] Holt, 3 Salk. 226. Mich. 5 W. & M. B. R. in case of Tilney v. Crop.—So carrying a fellow about *with horns*, and *bowing at B.'s door*. 2 Show. 314. cites Sir Wm. Bolton v. Dean.—For scandalous matter is not necessary to make a libel, it is enough if the defendant induces an ill opinion of the plaintiff, or to make him contemptible or *ridiculous*. 3 Salk. 226. in Case of Tilney v. Crop, 2. Show 314. cites Mingay v. Moody:

2 Salk. 417. Hill. 10 W. 3. B. R. 8. C.

10. A libel consists not in words and scandalous matter only; for that is not of itself sufficient, though spoken with never so much malice; but it is the *putting in writing*, or *procuring to be put in writing*; for if the words are not written, he is not guilty of the libel. 12 Mod. 219. Mich. 10 W. 3. the King v. Beere.

2 Salk. 417. S. C.

11. The *taking the copy of a libel* is a libel, because it comprehends all that is necessary to the making of a libel; it hath the same scandalous matter in it, and the same mischievous consequences attending it at first; for it is by this means perpetuated, and it may come into the hands of other men, and be published after the death of the copyer; and if men might take copies with impunity, by the same reason, printing of them would be no offence; and then farewell to all government. 12 Mod. 220. the King v. Beere.

12. In action on the case upon a libel it is sufficient if the *matter is reflecting*; as to *paint a man playing at cudgels with his wife*; per Holt Ch. J. 11 Mod. 99. Mich. 5 Annæ. Anon.

13. A defamatory writing, *expressing only one or two letters of a name*, in such a manner, *that from what goes before, and follows after, it must needs be understood to signify such a particular person* in the plain, obvious and natural construction of the whole, and would be perfect nonsense if strained to any other mean-

meaning, is as properly a libel, as if it had expressed the whole name at large; for it brings the utmost contempt unto the law, to suffer its justice to be eluded by such trifling evasions: and it is a ridiculous absurdity to say, that a writing, which is understood by every the meanest capacity, cannot possibly by a judge and jury. 2 Hawk. Pl. C. 194. cap. 73. f. 5.

14. It seems clear, that no writing whatsoever is to be esteemed a libel, unless it *reflect upon some particular person*; and it seems, that a writing full of *obscene ribaldry*, without any kind of reflection upon any one, is not punishable at all by any prosecution at common law, as I have heard it agreed in the Court of King's Bench; yet it seems, that the author may be bound to his good behaviour, as a scandalous person of evil fame. 2 Hawk. Pl. C. 195. cap. 73. f. 9.

(B) *Who shall be said to be Maker, Contriver, or Publisher. Or be punished as such.*

1. **H**E who *disperſes libels*, though he does not know the effect of them, nor ever heard them read, is punishable. Mo. 627. Mich. 43 & 44 Eliz. in the Star-Chamber. In Want's Case.

2. *Jurors at a wardmote inquest presented J. S. for incontinency*, for which J. S. complained of them in the Star-Chamber. But the Court would not examine the cause against them; because the precedent would be dangerous, to draw into the Star-Chamber jurors for their inquests. Mo. 627. Want's Case.

3. Resolved in a case of libels. 1. The *procurer*, and also the *writer* are both contrivers. 2. The *procurer of another to publish* the libel, and the publisher himself, are both of them publishers. 3. The *reading a libel, not knowing it to be a libel*, is not publishing. 4. He that *writes the copy of the libel by the commandment of his master or his father*, is not a publisher. 5. He that *laughs when he hears another read a libel*, is not a publisher if he does no more. 6. He that *lends a libel to be copied*, or he that *repeats the libel*, or any part of it, or *ſhews the contents of it*, or any part of it, knowing it to be a libel, is a publisher. So if one *writes the copy by commandment of his master or father, and then carries it to another*, he is a publisher. Mo. 813. Mich. 8 Jac. Lamb's Case.

9 Rep. 59.
b. LAMB'S
CASE must
be expound-
ed by Mo.
813. S. C.
where it is
reported as
resolved.
[88]
that the
writer of a
libel is, in
judgment of
law, the con-
triver; and
then
COKE'S
CASE, that

he that is convicted of a libel must be contriver, procurer, or publisher, is good law, but not otherwise; per Holt Ch. J. 12 Mod. 219. The King v. Beare.—S. P. in S. C. 2 Salk. 418. that if it be not expounded by Mo. 813. it may be doubtful; for if that case be looked into, the question there was about the publication of a libel, and it was held, that the writing the copy of a libel was not a publication, but only evidence of a publication. But there was no question made, how far he was guilty of libelling. And as for the matter of publication, the *bare having a libel* is not a publication; per Holt Ch. J. —But when a libel appears *under a man's own handwriting*, and no other author is known, it is a *taking in the manner*, and it turns the proof upon him; per Holt, *ibid.* 419. —* Mo. 822. Goodrick's Case.

4. If

2 Salk. 418.

—For he who dictated cannot be indicted for making this libel, because he did not write it;

and if the writer cannot be punished, this crime is unpunishable; per Cur. Carth. 406. S. C.—

* It is highly criminal. 2 Salk. 417. per Holt. Ch. J.—5 Mod. 167. S. C.—* Carth. 409. per Holt Ch. J. in Case of the King v. Bear.

4. If a libel be made in writing, and afterwards *burnt*, and one *remembers* the contents, and dictates to another who writes it, the *writer* is the maker of a libel. He that *takes a copy* of a libel in writing, though he be not the author, is guilty of making a libel; per Holt Ch. J. Cumb. 359. Hill. 8 W. 3. B. R. The King v. Pain.

5. If a libel be publicly known, *having a written copy* of it is evidence of a publication; but otherwise where it is not known to be published. Per Holt Ch. J. Hill. 10 W. 3. B. R. 2 Salk. 418. The King v. Bear.

Sec (A). (C) *Punished How. And what ought to be done with Libels when met with.*

1. A. R. was indicted in the King's Bench, for the making of a libel in writing *in the French tongue* against R. of S. *calling him* therein, *Roy de Raveners* &c. Whereupon he, being arraigned, pleaded thereupon not guilty, and was found guilty, as by the records appeareth. So as a libeller, or a publisher of a libel, committeth a public offence, and may be indicted therefore at the common law. 3 Inst. 174. cites Mich. 10 E. 3.

S. C. cited per Holt Ch. J. 1 Salk. 419. in Case of the King v. Bear.— and calls it a strong case.

2. J. N. an attorney of the King's Bench, wrote a letter to J. F. *one of the King's Council*, that neither Sir W. S. Chief Justice, nor his fellows the King's Justices, nor their clerks, any great thing would do by the commandment of our Lord the King, nor of Queen Philip. *in that place*, more than of any other of the realm; which said John, being called, confessed the said letter by him to be written with his own proper hand; *judicium Curiae, et quia praedictus Johannes cognovit dictam literam per se scriptam Roberto de Ferrers, qui est de Concilio Regis, quae litera continet in se nullam veritatem, praetextu cujus Dominus Rex erga Curiam & Justiciarios suos hoc in casu habere posset indignationem, quod esset in scandalum Justic. & Curiae; ideo dictus Johannes committitur Marefc. & postea invenit 6 manucaptores pro bono gestu.* 3 Inst. 174. cap. 76. cites Mich. 18 E. 3.

A libel, though the contents are true, is not to be justified. But the right way is to discover it

legally to some magistrate or other that may have cognizance of the cause; but it may be justified in an *action sur case*. Hob. 253. Lake v. Hatton.

3. If one finds a libel *against a private man*, he may either *burn it, or deliver it to a magistrate* immediately; but if it concerns a magistrate, or other *public person*, he ought immediately to *deliver it to a magistrate*, that the author may be found out. 5 Rep. 125. b. cites it as resolved Mich. 43 & 44 Eliz. in the Star-Chamber, in Halliwood's Case.

4. One

4. One was prosecuted in the Star-Chamber for composing and publishing an infamous libel in meter, scandalizing a deceased and present archbishop of Canterbury. It was resolved, 1. That every libel, (called *Famosus Libellus*, or *Infamatoria Scriptura*) made *against a private person* deserves a severe punishment; because it provokes all the family of that person to revenge &c. If it be against a *magistrate*, it concerns not only the peace, but scandalizes the government. 2. It is punishable, notwithstanding the *person scandalized be dead at the time*. 3. A libeller (called *Famosus Defamator*) shall be punished, either by *indictment at common law or by bill if he deny it, or ore tenus upon confession*, in the Star-Chamber, and that according to the greatness of his offence, it may be *by fine and imprisonment*, and if the case be exorbitant, by *pillory and loss of ears*. 4. It is not material, whether it be true or not, or of what fame the party libelled is. 5 Rep. 125. Pasch. 3 Jac. The Case De Libellis Famosis.

5. One was indicted for exhibiting an infamous libel directed to the King against Coke the Ch. J. of B. R. and the Court for a judgment given in the said Court in MAGDALEN COLLEGE CASE, affirming the said judgment to be treason, and *calling the Chief Justice Traytor, perjured Judge*, and scandalizing all the professors of the law: and this libel, he *fixed upon the great gate entering Westminster-Hall*, and diverse other places. And being arraigned, he put in a scandalous plea, affirming he would not plead otherwise. It was adjudged, that he should be committed to the marshal, stand upon the pillory with paper mentioning the offence, and be imprisoned till he submit himself to every Court, be bound to his good behaviour with sureties during life, and pay 1000 l. fine to the King. Cro. C. 175. Mich. 5 Car. B. R. Jeff's Case.

6. An information was exhibited against A. B. for causing to be framed, printed, and published, a scandalous libel intitled &c. thereby scandalizing of one C. D. Upon not guilty pleaded, it appeared upon the evidence, that *two of these libels printed were found at the lodgings of the defendant* upon warrants from the principal secretary of state to search there, he being suspected to be the contriver of it. The opinion of the Court was, That this was no crime within the information, though he *gave no account how they came there*; and the having of a libel, and not delivering of it to a magistrate, was only punishable in the Star-Chamber, unless the party maliciously * published it. Vent. 31. Pasch. 21 Car. 2. B. R. Anon.

* Though he never publishes it, yet his having it in readiness for that purpose if any occasion should happen, is highly criminal, and though he might design to keep it private, yet after his

death they might fall into such hands as might be injurious to the government, and therefore men ought not to be allowed to have such evil instruments in their keeping &c. Per Cur. Carth. 409. Trin. 9 W. 3. B. R. The King v. Bear.

(D) What is the *Distinct Power* of the Court, and of the Jury, as to Libels.

1. **I**N an information for a libel, it was urged, that the only thing to be examined by the Court is, whether the paper published contain any libellous matter; for then the *application must be left to the jury*. But per Cur. this rule is not to be taken so extensively; for where the application is merely indifferent, we will not grant an *information*, but there must be a seeming and apparent application to be made. Gibb. 57. Pasch. 2 Geo. 2. B. R. The King v. Butcheler.

[90]

(E) Pleadings, &c.

S. P. Resolved.
2 Salk. 660.
Mich. 5 Annæ. B. R.
The QUEEN v. Dr.
DRAKE.
which was an information for writing a libel, setting forth, that it contained several scandalous matters secundum tenorem sequentem, and in reciting a sentence of the libel it was (nor) instead of (not). Upon not guilty pleaded, this appeared in evidence, and a special verdict was found. The Court held,

that this was not a tenor by reason of the variance of (Nor) for (Not) which are different both in grammar and sense. — And there it was held by Holt Ch. J. That in pleading, there are 2 ways of describing a libel or other writing, viz. by the words, or by the sense. By the words, as if you declare of a libel *cujus tenor sequitur &c.* or *qui sequitur in his Anglicanis verbis sequentibus*, there you describe it by its particular words, of which each is such a mark, that if you vary, you fail in making good their description. 2 You may describe it by its sense and meaning; thus it is a good information to shew, That the defendant made a writing, and therein said so and so, translating it into Latin; in which case exactness of words is not so material; because it is described by the sense and substance

1. **A**N indictment was for composing, writing, making, and collecting *several libels in uno quorum continetur inter alia juxta tenorem & ad effectum sequentem*, and then sets forth the words. Upon not guilty, the jury found the defendant guilty as to the writing and collecting *prout* in indictment supponitur, & quoad omnia alia *prater* *scriptionem & collectionem not guilty*. Exception was taken, that (*inter alia*) shewed there was somewhat else, which perhaps might, if it appeared, qualify the rest. But per Cur. non allocatur; for then he could not be found guilty; and if any thing qualifies that which is set forth, it must be given in evidence. 2. It was agreed, that *ad effectum sequentem* of itself had been naught; for the Court must judge of the words themselves, and not of the construction which the prosecutor puts upon them; but the words (*ad effectum*) were corrected by the words (*juxta * tenorem*) which imports the very words themselves. 3. It was held, that the finding him guilty of the bare writing and collecting is criminal; not but that *collecting* had better been out of the case; and it being objected, that defendant being found guilty of collecting and writing, and not of making and composing, the verdict is repugnant, or an acquittal, non allocatur; for making is the genus, and composing and contriving is one species, and writing a second species, and procuring to be written a third species; so that not finding him guilty of all, but writing only, is finding him not guilty of any species of making but writing. 2 Salk. 417. Hill. 10 W. 3. B. R. The King v. Bear.

substance of it.—S. C. 11 Mod. 78. Pasch. 5 Annæ. Adjournatur.—Ibid. 84. Trin. 5 Annæ. Adjournatur.—Ibid. 95. Mich. 5 Annæ. Adjudged for the defendant. But says, that a writ of error was intended.

2. A man may *justify* in an action on the case for a libel; but otherwise in an indictment; per Holt Ch. J. 11 Mod. 99. Mich. 5 Annæ. Anon.

3. Upon a motion for an attachment against the defendant for publishing a libel on the Court of B. R. and a rule made upon him to shew cause why it should not be granted; it was moved to discharge that rule upon an *affidavit that his fault was not wilful, but merely through ignorance; that he had the libel from one C. a printer in C. that it was in Latin, which he did not understand, and that he did not know who was the author; otherwise than by a letter which he received from the printer, and which was now annexed to his affidavit; by which letter it appeared, that one Dr. Middleton was the author; so that having shewed how he came by this libel, and having told all that he knew of the author, for that reason it was insisted in his behalf, that the rule should be discharged, and that the printer should be prosecuted; but the rule was continued on the defendant until he made out his allegation against the printer, who was therefore joined in the rule, that both of them might be before the Court. In the next term Dr. Middleton appeared and confessed in Court, that he was the author of the book; and thereupon the rule was discharged against the defendant and the printer, and the doctor was committed till further consideration of the matter; and afterwards he was fined 50 l. and bound to his good behaviour for a year, and so was Dr. COLEBATCH the same term, for the like offence. 8 Mod. 123. Pasch. 9 Geo. The King v. Wiatt.*

[91]

4. Information for a libel was in the *disjunctive*, viz. *Scriptit seu scribi causavit*, and held not good. 8 Mod. 328. Mich. 11 Geo. The King v. Brereton.

(F) Publication. What.

1. *WRITING* the copy of a libel is not a publication thereof, but only an evidence of a publication; per Holt Ch. J. 12 Mod. 220. cites Mo. 813. and 9 Rep. 59. b. Dr. LAMB's Case; and says the writing the original libel itself is the same; and if a publication of it has been proved, it is evidence that the publication was by him that had it in his custody.

(A) Libraries.

1. 7 Ann. *WHEREAS* several charitable persons have of late years erected libraries within several parishes and districts in England and Wales, it is hereby enacted, that in every parish or place where such library is, or shall be erected, the same shall be preserved for the use appointed by the founder.

S. 2. And every incumbent, minister, or curate of a parish, before he shall be permitted to use such library, shall give such security for the preservation thereof, and observation of the rules and orders appointed by the founder &c. as the proper ordinary shall think fit.

And if any book shall be taken away and detained, it shall be lawful for the said incumbent &c. to bring an action of trover in the name of the proper ordinary, and recover treble damages, to be applied to the use of the said library.

S. 3. And it shall be lawful for the ordinary, his commissary or official, or for the archdeacon, his official or surrogate by his direction, if such archdeacon be not incumbent of the place, to inquire, at his or their visitation, into the condition of such libraries, and to redress the grievances and defects concerning the same.

And it shall be lawful for the ordinary from time to time to appoint such persons to view the condition of the said libraries, as they shall think fit.

S. 4. And where any library is appropriated to the use of the minister of any parish, such minister, or curate, within 6 months after his institution, induction, or admission, shall make a catalogue of all books remaining in such library, and sign the same, thereby acknowledging them to be in his custody, which shall be delivered to the proper ordinary within the time aforesaid, to be registered gratis.

S. 5. And where a library shall hereafter be given to the use of any parish, or place where there is an incumbent, minister, or curate in possession, such incumbent &c. shall make a catalogue as aforesaid, and deliver the same within six months after he shall receive such library.

S. 6. And upon the death of any incumbent &c. the library belonging to any parish or place shall be locked up by the church wardens, or such other persons as shall be appointed by the ordinary till a new incumbent &c. shall be inducted or admitted.

[92] S. 7. Provided that if the place where such library is kept shall be used for the meeting of the vestry, or any other parish business &c. it shall be used as formerly, but after such business dispatched shall be again locked up and secured.

S. 8. A book shall be kept in the said library wherein the minister shall

shall enter all benefactions, and an account of all such books as shall be given, and by whom.

S. 9. *And it shall be lawful for the ordinary and the donor, if living, and after his death for the ordinary alone, to make such rules and orders concerning the same, as he shall think fit, not being contrary to such as the donor shall have made; which said orders shall be entered in the said book, and kept in the library.*

S. 16. *And no book shall be alienable without the consent of the ordinary, and then only where there is a duplicate of such book; and if any book be taken away or lost, a justice of peace may grant his warrant to search for the same, and if found, order it to be restored to the library.*

S. 11. *Provided that this act do not extend to the public library at Ryegate in Surrey.*

Licence.

(A) Licence. How it *differs from*, or is a Grant. See Grant.

1. **I** F a man licences me to enter into his land and to occupy it for a year, half a year, or such like, this is a lease, and so shall be pleaded. Br. Licence &c. pl. 19. cites 5 H. 7. 1.

2. A licence to hunt, and carry away the deer killed to his own use, or to cut down a tree in a man's ground, and to carry it away the next day to his own use, are licences as to the acts of hunting and cutting down the tree; but as to the carrying away the deer killed, or the tree cut down, they are grants. Vaugh. 351. Thomas v. Sorrell.

(B) Good.

See Corp. &
ration
Grant.

1. **I** F a man is bound in an obligation of 40 l. upon condition, or defeasance, that if J. S. be servant to the obligee for 7 years, that the obligation shall be void; per Cur. it is a good plea that the obligee licenced the servant to go &c. though the licence be only by parol. Br. Licences, pl. 18. cites 6 E. 4. 2.

2. A condition to a licence is void; as a lease for years on condition that he pay 20 l. the second year, this is void; for the

licence does not give a right, but only executes it, as a livery or attornment. Owen. 73. Hill. 38 Eliz. Haddon v. Arrow-smith.

(B. 2) Granted by whom good. *Servant, Bailiff &c.*

[93]
* Orig.
(Vender le
stuff.)

1. NOTE, that licence of a parker to hunt and chase in the park of his master is not good; *contrary* of the licence of a bailiff to take a cow, or to milk her, or to ride a horse to such a place; for he has authority to sell * them; quære. Br. Licences, pl. 20. cites 2 E. 4. 4.

2. Trespass *de parco fracto* upon the statute 3 E. 1. 20. for killing 2 deer; the defendant said, that the parker prayed him to kill the deer, and he did it, and the best opinion was that it is no plea; for the parker himself cannot do it by his office, but only to keep the game. Br. Trespass, pl. 295. cites 2 E. 4. 4.

3. Parkers and shepherds are only keepers of the game, and sheep. Br. Trespass, pl. 295. cites 2 E. 4. 4.

4. It was found upon a special verdict, that the parson of the parish made A. collector of tithes, and that A. had licenced a parishioner to carry away his corn without setting forth of tithes; per Cur. clearly, the licence is void, and a consultation was awarded. Noy. 134. Brickendine v. Denwood.

(C) How it must be pursued.

So if I have
licence to
impark 200
acres and do
it accord-
ingly, and
after increase it by another 100 acres, there this no park; quære, of this. Br. Patents, pl. 76. cites 23 H. 8. — 2 Rep. 8. b.

1. LICENCE or authority must be pursued *strictly*, as well in form as in substance; as licence to impark 300 acres, he cannot impark but 100 acres only. Arg. Owen. 73. cites 10 H. 7.

S. P. Bridgm.
114. cites
30 E. 3.
17. — So
where the
King li-
cences one to alien the third part of his land, and he aliens all; the alienation is void in all. Fin. Law. 8. b.

2. If the king licences his tenant to alien his manor of D. and he aliens it except an acre; the licence shall not serve it; for there the King is not ascertained of his tenant of the whole. Br. Patents, pl. 76. cites 23 H. 8.

In this case
North took
a difference
where cer-
tain time is
limited for
the loan of
the horse

3. In trespass for immoderately riding his mare; the defendant pleaded, that the plaintiff lent him his said mare and *licentiam dedit eidem* (defendenti) *equitare* upon the said mare, and that by virtue of this licence the defendant and his servant did ride *alternatim* upon her. The Court upon demurrer held the licence annexed

annexed to the person, and not to be communicated to another. *and where not; in the first case, the party to whom the horse is lent hath an interest in the horse during that time, and in that case his servant may ride, but in the other case not; and a difference was taken between hiring an horse to go to York, and borrowing an horse; in the first case the party may set his servant up, but not in the second. Ibid.*

Mod. 210. Hill. 27 & 28 Car. 2. C. B. Bringloe v. Morris.

(D) Extent thereof.

See Grant (F)

1. **WHETHER** a licence *to hunt* gives a power to *kill and carry away* is left a quære per Brook. Br. Licence, pl. 6.

In trespass it was held by 4 that where a man

gives me licence *to hunt and kill a buck in his park* * and to dispose of it, my + servant cannot justify to do it *by my command*; for a licence goes strictly to him to whom it is given, and to no other; *contrary of a gift by which a man gains a property*; and by this licence, he that has the licence cannot bring his servant with him; for this is out of the licence; and if a man gives licence *to kill a buck, he † cannot take it away* with him; per Chocke. Nevertheless three others were of a contrary opinion, and that a man may kill the buck by his servant; quære inde. Br. Licence, pl. 12. cites 18 E. 4. 14. — * Orig. (& ceo dispense.) — † S. P. Bridgm. 115. cites 12 H. 7. 25. — ‡ S. P. Br. Contract, pl. 4. cites S. C. — S. P. Godb. 359. Trin. 21. Jac. B. R. per Haughton. J.

2. Where command is given to W. N. *to enter* the park of the [94] commander *and deliver beasts* to J. S. there J. S. cannot justify to enter with W. N. to receive the beasts, but shall stay without and receive them there; by the best opinion. Br. Licence, pl. 14. cites 18 E. 4. 25.

3. If a man licences me *to hunt in his park*, I may take with me *as many of my servants as are necessary* to attend upon me, and the one and the other may justify; per Fineux; but Yaxley e contra; therefore quære. Br. Trespas, pl. 207. cites 12 H. 7. 37. — N. B. The book is miscited.

If a man gives licence to J. S. *to take and kill a deer in his park*, he may take with him

his servants to chase and kill the deer; per all the Justices. Br. Trespas, pl. 434. cites 13 H. 7. 10. — So if it be *to chase, kill, and take deer at his pleasure*; per Cur. Ibid. pl. 434. cites 13 H. 7. 13. — But if a man licence W. N. *to chase in his park*, he cannot take others with him to chase; per Cur. for this licence is for pleasure only, and not for profit. Ibid. — S. P. Fin. Law. 8. b. cites S. C. — S. P. per Mountague. Palm. 73. Hill. 17 Jac. B. R. in Case of Webb v. Pater-

4. If J. licence W. N. *to eat with me, or * walk in my orchard*, he shall not take others with him; per Cur. Br. Trespas, pl. 434. cites 13 H. 7. 13.

* S. P. Fir; Law. 8. b. cites S. C.

5. *Contrary*, if he licence me *to carry over his land, or to take trees*, I may take others with me to do it; *for this is profit*; quod nota, per Cur. Br. Trespas, pl. 434. cites 13 H. 7. 13.

6. A way granted *to go to church over my land* does not extend to any other, but *only to himself*; for it is only an easement, Fin. Law. 8. b.

7. A licence, as to put in his beasts, is indefinite, till it be *determined* by him that gave the licence; per Vaughan Ch. J. Cart. 218. Pasch. 23 Car. 2. C. B. Whately v. Conquest.

See Interest.

(E) Countermandable,

As if I licence one to dig clay in my land, this is revocable, and may be

countermanded, though it be in point of profit, which is a stronger case than a licence of pleasure. Poph. 151. Hill. 17 Jac. Webb v. Paternoster. — If a certain time is limited 'tis not revocable, though the thing is not done. Jenk. 209. pl. 41. — Licence by the King for a certain time is revocable where loyalty is concerned. Jenk. 246. pl. 35. and 220. pl. 69. — Licence executed is not countermandable; *secus of ex-cutory*; per Haughton. Palm. 74. — 2 Roll. R. 152. per Haughton J.

There is a great diversity between a licence in fact, which giveth an interest, and a licence in fact which giveth only an authority or dispensation; for the one is not to be countermanded, but the other is. Arg. Lane. 46. cites 5 H. 7. and 1 Ma. Dyer 92.

See D. 177. pl. 31. where it is said that by the best opinion a licence granted for a time certain is not countermandable.

2. If a man licence another to occupy his horse for four days in his land &c. the licensor may countermand the licence within the four days; nevertheless contrary, if he gives or grants for four days, he cannot countermand; note the difference; per Cur. Br. Licence, pl. 9. cites 39 H. 6. 7.

3. Trespas in his land; the defendant justified for common for 20 beasts, the plaintiff said that the defendant put in 40 beasts over and above the 20 beasts, of which he has brought this action; upon which the defendant pleaded licence of the plaintiff; and the plaintiff pleaded countermand of the licence, and that the defendant did the trespass after, and well; quod nota, that he may countermand. Br. Trespass, pl. 229. cites 39 H. 6. 7.

S. P. Fin. Law. 8. b.

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4. A man may discharge his licence after, and where he gives to me licence to enter into his house, by which I enter, if he discharge me after, there I shall be compelled to go out of the house, unless it were *tempore tempestatis*, for then I may remain; per Wood Justice. Br. Licence, pl. 15. cites 20 E. 4. 4.

5. The King licences A. to go beyond sea, and to stay there for a certain time; provided, that if he conspires or converses with fugitives, or the King's enemies, that then his licence shall be void; after the time of this licence, the King commands him upon his allegiance, by a privy seal, to return; his licence is revocable during the time allowed; for it concerns his loyalty, and does not give him an interest; his conversing with fugitives does not make it void ab initio, but only from the time of such his conversing. Jenk. 220. pl. 69.

(F) De-

(F) Determined.

1. **TRESPASS** by baron and feme for chasing in their warren, and taking and carrying away 20 hares &c. *dum uxor sola fuit*, the defendant pleaded licence of the feme, *dum sola fuit*, for him and his servant to chase at their pleasure, by which he chased, and killed, and carried away prout &c. and a good plea without shewing the deed of the licence; per Cur. Nevertheless quære, if by the marriage the licence is determined, so that he cannot chase after. Br. Licence, pl. 6. cites 22 H. 6. 52.

2. Licence to erect a stack of hay till he may conveniently sell it; it stood two years and then a lease was granted to a stranger of the land, who gave notice to remove it, and half a year after turned his beasts into the field, who eat of the hay; yet because of the convenient time to remove, judgment was for the defendant. Palm. 71. Hill. 17 Jac. B. R. Webb v. Paternoster.

Godb. 28a.
S. C. — 2.
Roll. R.
143. 152.
S. C. —
He should
have fenced
it in. Poph.
151. S. C.
Noy. 98.
PLUMMER

7. WEBB, S. P. and S. C. reports it as a general licence, and adjudged for defendant, because not removed in convenient time, and that the licence determined by the lease, and so the damage was by the plaintiff's own default.

(G) Actions and Pleadings.

1. **TRESPASS** for chasing in his warren; the defendant pleaded licence of the plaintiff; and good, without shewing the deed. Br. Monstrans, pl. 130. cites 42 E. 3. 2.

2. If a licence is pleaded, he ought to shew the place where &c. Br. Pleadings, pl. 96. cites 6 E. 4. 2.

3. In trespass, if a man pleads that the baron gave licence to the defendant by his feme, or an abbot by his commoigne, this shall be pleaded by the baron himself, and by the abbot himself, and the feme and commoigne shall be * ousted of the book; per Cur. Br. Pleadings, pl. 126. cites 10 E. 4. 4.

* Orig.
(Ouster del
liver.

4. In trespass, if the defendant pleads licence of a corporation, it is not good without deed; and where a man pleads licence to enter into his house, and the plaintiff says, that the defendant broke the door and the windows, and claimed to his own use, which is the same trespass of which he brings his action; per Cur. it is no good replication, where he justifies by licence in fact, without traversing the licence, contrary of a licence in law. Br. Licences, pl. 17. cites 21 E. 4. 75.

5. If a man licence me to enter into his land, and occupy it for a year, half a year or such like, this is a lease, and so shall be pleaded, and not a licence; and it is said elsewhere for law, that licence cannot be given in evidence upon another issue, but ought to be pleaded. Br. Licences, pl. 19. cites 5 H. 7. 1.

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6. In

S. C. Sid.
428. Mich.
21 Car. 2.
B. R. takes
notice that
the scil. was
of a day
which was
the day after
the trespass,
and there-
upon the
plaintiff de-
murred ge-
nerally; and
it was said
at bar, that
the scilicet

6. In *trespass*, the plaintiff declared that the defendant, on the 24th of January, entered, and *took possession of his house*, and kept him out of possession to the day of exhibiting the bill; the defendant *pleads*, that *ante præd. tempus quo, scil. &c. the plaintiff licensed the defendant to enjoy the house till such a day*. It was insisted, that the plea is naught in substance; for a licence to enjoy from such a time to such a time is a lease, and ought to be *pleaded as a lease, and not as a licence*, and that it is a certain present interest. Twisden J. said, that if one doth licence another to enjoy his house till such a time, it is a lease, but whether it might not be pleaded as a licence, he had known it doubted. Judgment nisi &c. Mod. 14. Trin. 21 Car. 2. B. R. Hall v. Sebright.

is void, and does not vitiate the bar upon general demurrer. But the Court held that it made the plea ill in substance, and so judgment was given for the plaintiff, and the rather, because there was *no traverse*. ——— 2 Keb. 561. S. C. adjudged, and that it was held per Cur. that this was a lease, and should have been so pleaded, and cannot be at the will of one; but this is but general issue, and aided by general demurrer.

Vent. 18. S.
C. Pasch.
21 Car. 2.
B. R. and
the Court
was of opi-
nion, that
defendant
might have
demurred in
this case;
but that af-
ter a ver-
dict, the
Court shall
intend that
they were
beasts which

7. In *replevin*, the defendant *avows as a commoner for taking goods damage feasant in loco in quo &c.* The plaintiff *pleads in bar of the said avowry, that the parson of Dale is seized of such glebe land, and that he had common in loco, in quo &c. for 200 sheep levant and couchant upon the same glebe land. And that the plaintiff, by the licence of the said parson, put in his cattle, and issue is taken upon the levant and couchant, and found for the plaintiff.* And it was moved in arrest of judgment for the avowant, because licence cannot be given by a commoner to put in the cattle of a stranger; and here the plaintiff was only a trespassor upon the parson; and such licence cannot be without deed. 2 Cro. 574. MONK v. BUTLER. And stay until &c. Raym. 171. Mich. 20 Car. 2. B. R. Rumsey v. Rawson.

the parson had procured to compeßer his land, and the right of the case is tried, and so aided by the statute of Oxford; but time being given to shew cause, it was insisted at another day that the licence ought to have been shewn to be by deed, being to take a profit in alieno solo; but it was answered, that a parol licence was sufficient in this case, being *only to take the profit unica vice, and there passing an estate by it*, and the plaintiff had judgment. Ibid. 25.

Lien.

(A) Lien. What is a Lien on the Lands.

1. *A. Was bound in a statute to B. and one C. lent 100 l. to A. with which A. bought lands, and assured the same to C. for his 100 l. A. failed in payment, B. extended that land. C. was denied help in Chancery, although the land was bought with his money; for B. hath priority of right in law without covin. Cary's Rep. 11, 12. cites Crompton 63. 2.*

2. *Recognizance before execution is no charge upon the land, nor has the recognizee any right or demand in the land; for the land is not the debtor but the person; and the land is charged only in respect of the person. Cro. E. 552. Pasch. 39 Eliz. B. R. Barrow v. Grey.—Parl. Cases 74. in Case of the King v. Baden. S. P.*

[97]
Baron Turner said, that recognizances were only charges on the land, but could have

no interest where there was a prior mortgage in fee taken in by an incumbrance subsequent to the recognizances. Hard. 173. Mich. 12 Car. 2. Hacket and Bedell v. Wakefield.

3. *Fine by tenant for life to reversioner in fee, and declared the uses to reversioner and his heirs, on condition to pay 40 l. per ann. to him for his life, and for default to the use of the conufors.—This annuity is a lien on the land into whosoever hands it comes, and for non-payment he may enter. Cro. E. 688. Trin. 41 Eliz. B. R. Smith v. Warren.*

4. *A judgment after a mortgage cannot affect the land in mortgage in law. Arg. Mich. 1682. Vern. 64. in Case of Girling v. Lee.*

A judgment is only a general security, and not a specific

lien on the land. Wms's Rep. 279. Trin. 1715. in Case of Finch & al. v. Lord Winchelsea.

5. *A. a purchaser mortgaged back the land for part of the purchase-money, and gave a note for other part. A. devised his land for payment of his debts. Though the note was for part of the consideration money, and though the same person that mortgaged had the real estate in him, yet per Cur. he can have no preference, but must accept satisfaction in proportion only with the other creditors. 2 Vern. 281. Mich. 1692. Bond v. Kent.*

A bond was given for part of the purchase-money, and the bond was lost, and the purchaser being dead, the Ld Chancellor was of

opinion, to charge the widow and son with payment of the money due on the bond, in regard of the land being in their possession. Hill, 1 Jac. Cary's Rep. 35. Hearte's Case.

6. The *elegit* itself (when sued out) doth not immediately touch the lands; for if the chattels are sufficient, and it appears so to the sheriff, he ought not to extend the land. Arg. Parl. Cases 74. in Case of the King v. Baden.

7. A. cesty que trust of a farm, whereof eight acres were copyhold, and which were agreed to be settled on A. and a covenant to surrender them accordingly, *mortgaged* the farm to B. by the name of such a farm, with the general words, *All and singular the lands and tenements parcel thereof, or usually occupied therewith &c. but says nothing of the eight acres being copyhold, nor does he covenant to surrender them.* A. died, the surrender of the copyhold eight acres not being made to him. B. got a decree of foreclosure against C. the sister and heir of A. . And afterwards, the covenantor (the father of A.) being *indebted by judgment to J. S.* at the request of C. *surrendered the eight acres to J. S.* J. S. brought an ejectment, and got judgment, whereupon B. brought his bill for relief. And the question was, between B. the mortgagee and J. S. whether the mortgage was a lien on the copyhold; and the Ld. Chancellor held, that the copyhold was never by the mortgage under any specific lien, and that it would be the same, were there no creditor in the case. And he took a *difference* where a man originally lends money upon a security, and having money due on a bond, tells the debtor he will trust him no longer upon personal security, and thereupon he mortgages land to him; and where a man already trusted with money, seems insolvent, and thereupon his creditors to bolster up their security as well as they can, find out copyhold lands, and get a surrender of them. For in the first case, he trusts his money on the real security; but in the latter he does not. And so dismissed the mortgagee's bill, and affirmed a decree made by the Master of the Rolls. G. Equ. Rep. 13. Hill. 7 Annæ. Oxwith v. Plummer.

[98] 8. The creditors of J. S. brought a bill for debts, viz. mortgages, judgments and bonds; upon one of the bonds the *defendant was outlawed*, and upon one of the judgments the recoverer had brought an action of debt; and the question being concerning the priority of payment, it was objected, that the judgments were by confession, and it was not equitable that it should be in the power of the party to prefer one creditor to another, but that seemed to be over-ruled: and as to the outlawry, the Court ruled, that being only *upon mesne process before judgment*, it did not alter the nature of the debt, nor create a lien upon the land in this case: *but* that where there is an *outlawry*, and a *seizure* thereupon, the debt attaches upon the land, and shall be preferred to a judgment, though prior to the outlawry; but that it is the seizure that gives the preference. 1 Salk. 80. Trin. 1714. in Canc. Erby v. Erby.

9. A decree for a debt does not bind the real estate, it acting only in personam, not in rem, and the remedy upon a decree to affect

affect the land, is only for a contempt, whereupon the party proceeds to a sequestration. 2 Wms's Rep. (621.) Trin. 1731. by the Master of the Rolls. *Bligh v. Lord Darnley*.

(B) What *Agreement* is a Lien on Lands.

1. *A. Was jointress for life, remainder to B. in tail, remainder over. B. agreed with A. that if A. would make a conditional surrender of her estate for life, to enable B. to suffer a recovery, and mortgage part of the premises, then B. would settle the residue, together with the equity of redemption upon himself for life, remainder to his first &c. son, remainder over. A. surrendered. B. suffered a recovery, and made a mortgage, but never made the settlement after the agreement. B. became indebted by bond and judgment. The agreement was not in writing, but acknowledged by letters under B.'s hand. The agreement was decreed by Ld. Ch. Harcourt, at the suit of the remaindermen in the intended settlement, to be carried into execution and affirmed in the House of Lords. But afterwards, a point came before Ld. Ch. Cowper, whether the creditors by judgment subsequent to the agreement should be paid their judgments; it was argued, that from the time of this agreement, B. was but as a trustee for the uses in the settlement, and as such could not bind the estate; to which it was answered, that this case was not like that of a trustee out of possession; for B. was in possession, and as he was seised of the legal estate in fee, so he was also the visible owner of it, and might be supposed to be trusted upon the credit of this estate. Ld. Cowper said, that articles for a valuable consideration, and the money paid, will in equity bind the estate, and prevail against any judgment creditor, mesne betwixt the articles and the conveyance; but this must be where the consideration is somewhat adequate to the thing purchased; otherwise, if the money paid is but a small sum, in respect of the value of the demand, this shall not prevail over a judgment creditor; that in this case, the consideration was not adequate; for A. parted with no money, but only made a conditional surrender. Wms's Rep. 277. to 283. Trin. 1715. *Finch & al. v. Ld. Winchelsea*.*

(C) *Waived* by what Acts.

See Jointress.

1. THE creditors of J. S. brought a bill for debts, which debts were mortgages, judgments and bonds; upon one of the bonds the defendant was outlawed, and upon one of the judgments the recoveror had brought an action of debt, and the question was upon the priority of payment. It was objected, that the bringing debt upon the judgment was a waiver of the lien created by that judgment; for it can only extend to the land that

that the party had at the time of the later judgment; but the Court held, that the bringing debt upon the judgment did not postpone this to other judgments, and that it was the act of the attorney, and that it would be no waiver, because there was no other remedy after the year and day at common law. 1 Salk. 80. Trin. 1714. in Canc. Erby v. Erby.

(D) Descends on whom.

1. **I**T was demanded in Bank, of what effect judgment in warrantia chartæ *pro loco et tempore* is, and it was moved, that *warranty is only a covenant*, and by this covenant a man *shall not bind the land to be delivered in value to whosoever hands it comes after by purchase*, or otherwise; for this is a mischief, *quod verum est*; he shall not be so bound by the warranty or covenant real; but *otherwise* it seems, *by the special judgment* above. Br. Warrantia Chartæ, pl. 8. cites 2 H. 4. 14.

2. Lien *real* descends only on the heir at the common law; but lien *personal* binds all, as heirs in gavelkind &c. As if A. binds himself and his heirs in a bond &c. Per Coke Ch. J. Cro. J. 217. Hill. 6 Jac. B. R. in Case of Game v. Simms.

[See Voucher, and other PROPER TITLES.]

(A) Life.

1. **L**IFE *shall not be twice in jeopardy*, viz. once at the suit of the King, and once at the suit of the party. Br. Appeal, pl. 9. cites 44 E. 3. 38.

2. If a man be once acquitted, he shall not put his life in jeopardy again *for the same offence*; *quod nota bene*. Br. Appeal, pl. 12. cites 45 E. 3. 25. and 21 E. 3. 24. acc.

3. *The law favours life*. See Maxims.

* Limit-

* Limitation.

(A) Time of Limitation.

[1.] N 11 H. 3. a man could not claim in a writ of right any land, *ante annum & diem quo avus avi de H. 3. (qui fuit H. 1.) fuit vivus & mortuus.* 11 H. 3. Rot. 7. between Richard de Hoff, and John de Rengny, adjudged, and † put positively. (Note that this was before the statute of Merton.)]

[2. But a man ought then to claim land of a seisin, the year and day in which H. 1. fuit vivus & mortuus. 11 H. 3. Rot. 7. aforesaid, admitted.]

* Moreton cap. 8.

touching conveyance of descent in a writ of right from any ancestor, from the time of King Henry the elder, the year and day: it is provided, that from henceforth there be no mention of so long time, but from the time of King Henry our grandfather. And this act shall take effect at Pentecost, the 21st year of our reign, and not afore. And the writs before purchased shall proceed; writs of mortdancestor of nativis, and entry, shall not pass the last return of King John from Ireland into England. And this act shall take effect as before is declared; writs of novel disseisin, shall not pass the 1st voyage of our sovereign lord the King that now is into Gascoine. And this provision shall take effect from the time aforesaid, and all writs purchased before shall proceed.

* Limitation, as it is taken in law, is a certain time prescribed by statute, within which the demandant in the action must prove himself or some of his ancestors to be seised. Co. Litt. 114. b. † Orig. (mise.) [100]

* By 20 H. 3. cap. 8.

[3. Rot. Parliamenti 43 E. 3. Numero 16. The Commons pray because all the time of King Richard is held for time of memory, of which time no man can have true cognizance that it please to limit in certain the time of memory, so that it doth not pass the coronation of the King Edward, grandfather of our lord the King, who now is. And like petition for diverse opinions and mischiefs, which happened 46 E. 3. No. 28. But no assent to them. But the answer to the first is, let the law stand which hath been used hitherto till it be otherwise ordained.]

4. Westm. 1. 3 E. 1. 39. Seisin of one's ancestor in a writ of right shall be from the time of R. 1, in an assise of novel disseisin, & nuper obiit from H. 3. his voyage in Gascoign, and in a mortdancestor, cofinage, ayel and neise from the coronation of H. 3.

5. The ancient limitation in writs of novel disseisin & nuper obiit, was post primam transfretationem of King Henry; and the limitation in writs of ayel, cofinage, mortdancestor, and in writs of entry, was after the coronation of King Henry, and such a limitation was in avowry as in assise, and the limitation in writ of right was from the time of King Richard the first, and the limitation of common was before the coronation of King Henry, which see amongst the statutes. Nevertheless note now, that all these limitations

are void, and a new limitation made by the statute of 32 H. 8. 20. Br. Limitation, pl. 4. cites 5 Aff. 2.

* **Ld. Coke** 6. * 32 H. 8. cap. 2. §. 1. Enacts that *no person or persons shall sue, have, or maintain any prescription, title, or claim, to or for the possession of his ancestor, or predecessor, and declare and allege any farther seisin or possession of his or their ancestor or predecessor, but only of the seisin or possession of his ancestor or predecessor, which hath been, or now is, or shall be seised within 60 years next before the teste of the same writ, or next before the said prescription, title, or claim so to be sued, commenced, brought, made or* *had.*

Weston J.—

A sci. fa. to execute a judgment, and a *quid juris clamat* are not remedied by this statute; because *no lands are demanded by them.* Bendl. 194. in Case of *Whitton v. Compton.*

All the ancient statutes of limitation are repealed by this statute. Br. Limitation, pl. 1.—It seems clear, that the new limitation extends to copyhold as well as to freehold; for the statute is, that *he shall not make prescription, title, nor claim, &c.* and those who claim by copy make prescription, title, and claim, &c. and also the plaints are in nature and form of writ *domini regis ad communem legem, &c.* and those writs, which are now brought at the common law, are ruled by the new limitation, and therefore the plaints of copyhold shall be of the same nature and form. Br. Limitation, pl. 1. cites 6 E. 6.

S. 2. In a mortdancer, cosenage, aiel, writ of entry, surdisseisin, or any other possessory action upon the possession of his ancestor or predecessor, it shall be within 50 years before the teste of the original of any such writ.

* See (N). S. 3. In a writ upon the parties * own seisin or possession, it shall be within 30 years before the teste of the original of the same writ.

* **Avowry.** S. 4. In an * avowry or cognizance for † rent, suit, or services † of the seisin of his ancestor, predecessor, or his own, or of any other, whose estate he pretends to have, it shall be within 40 years before the making of such avowry or cognizances.

This act as to avowries, [101] extends only to rent, suit, or service, so as relief is not within the purview of the law; for it is no service but a duty, by reason of the tenure and service; and albeit homage, fealty, and escuage, and other accidental services (being services) are within the letter of the law, yet they and all other accidental services, as *beriot service*, or *to cover the lords hall*, and the like (for that they may not happen within the times limited by that act) are by construction out of the meaning of this statute; but albeit relief be not within this statute, yet in avowry for relief, the avowant must allege a seisin of the services within the ancient statute, viz. post primam transfretat. regis Henrici in Gasconiam, and the seisin of the services is traversable. And so it is of homage, and fealty, and escuage; albeit they be out of the statute of 32 H. 8. yet are they within the ancient statute, 2 Inst. 95, 96.—So of a rent-charge. Bendl. 194. in Case of *Whitton v. Compton.*

In replevin, the defendant avowed upon a tenure by fealty, rent, and suit of Court; the plaintiff in his replication confessed the tenure, but that the avowant, nor none of his ancestors were seized of the said services, or any of them within 50 years; the defendant demurr'd, and had judgment; for fealty, homage, and such casual services, as perhaps may not happen within 50 years, are not within this statute. 3 Lev. 21. Trin. 33 Car. 2. in *C. B. Bennet v. King.*—S. P. resolv'd 10 Rep. 10. b. Mich. 17 & 18 Eliz. *Bevil's Case.*—S. P. is left a quære by the reporter. D. 230. b. pl. 19. Mich. 15 & 16 Eliz.

† See (M).—† This statute extends not to a cessavit, rescous, &c. Arg. Litt. R. 242.—The writ of cessavit is not comprised in the statute of 32 H. 8. 2. Nor is the seisin of the services material or traversable in cessavit; but the defendant shall answer to the tenure; as to say, that he holds not of him, and that is a good plea; per *Dyer* Mo. 44.

In all these four branches [viz. sect. 1, 2, 3, 4.] this word (*seisin*) is spoke indefinitely; and therefore, if the act had gone no further, this word should be construed according to the subject matter, sometimes for actual seisin, sometimes for seisin in law; and therefore, as to the writ of right, mortdancer, aiel, &c. assise, &c. it shall be intended of an actual seisin, and not of a seisin

seisin in law; so that the three first branches are to be intended only of an actual seisin; and the fourth branch concerning * *avowries* extend to seisin in law, as well as actual seisins. 4 Rep. 10. in *Bevil's Case*.—* See *Avowry*.

S. 5. * *Formedons in reverter or remainder, and scire facias upon fines, shall be sued within 50 years after the title or cause of action accrued, and not after.* * See pl. 8. S. 1. and see (L) pl. 2, 3.

S. 6. *The party, demandant, plaintiff, or avowant, that (upon traverse or denial by the other party) cannot prove actual possession or seisin within the times above limited, shall be for ever after barred in all such writs, actions, avowries, cognizance, prescription, &c.*

S. 11. *Provided, that in any of the said actions, avowries, prescriptions, &c. the parties grieved may have an attaint upon a false verdict given.*

7. 1 *Ma. 1 Parl. 2 Sess. 4. s. 4. enacts, That the statute of 32 H. 8. 2. shall not extend to a writ of right of advowson, quare impedit, assise of darrein presentment, jure patronatus, writ of right of ward, writ of ravishment of ward, nor to the seisor of the ward's body or estate, but the time of the seisin, to be alleged in such cases, shall be as it was at the common law before the making of the said statute.* Before this act, if the incumbent of an advowson had lived 60 years, and died, and a stranger had presented, or

if one had a seignior by knight-service, and had not been seised of it by 60 years, by reason of his tenant living so long, or otherwise, and the tenant had died, his heir within age, and another had seised him, and entered into the land; in the one case, he could not have quare impedit, or darreine presentment, nor in the other, right of ward, or ravishment of ward. And such mischief, from persons living so long, was not remedied either by exposition of the words, or by the equity of the act, till the same was remedied by this statute; that act being made to restrain it to a time for the tranquility and repose of the people, in which case, no time shall be gained by exposition or equity, beyond the strict words of the act; per Catlin. Pl. C. 371. b. in *Case of Stowell v. Zouch*.

8. 21 *Jac. 1. cap. 16. s. 1. For quieting of men's estates, and avoiding of suits. Be it enacted, &c. That all writs of * formedon in descender, formedon in remainder, and formedon in reverter, at any time hereafter to be sued or brought, of or for any manors, lands, tenements, or hereditaments, whereunto any person or persons now hath, or have any title, or cause to have or pursue any such writ, shall be sued and taken within 20 years, next after the end of this present sessions of parliament; and after the said 20 years expired, no person, &c. or any of their heirs, shall have or maintain any such writ, of or for any of the said manors, &c. and that all writs of formedon in descender, formedon in remainder, formedon in reverter, of any manors, &c. whatsoever, at any time hereafter to be sued or brought by occasion or means of any title or cause hereafter happening, shall be sued and taken within 20 years, next after the title and cause of action first descended or fallen, and at no time after the said 20 years.* * See (L) pl. 1.—Plaintiff in ejectment may make title by a collateral warranty, and give it in evidence as his title, according to 10 Rep. 97. So, if a disseisor dies [102] after five years quiet possession, and the disseisee enters, the heir may

maintain ejectment; for the right of possession belongs to the heir, though the mere right be in the disseisee. 2 Salk. 685. held per Cur. in *Case of Smith v. Tyndall*.

So if a man enters by wrong, and disseises another, and continues 20 years in quiet possession, yet in this and the former case, if a writ of right be brought, and the *mise joined upon the meer right*, the verdict must be for the plaintiff, notwithstanding the statute of limitations in the one case, or the collateral warranty in the other. 2 Salk. 685. *Smith v. Tyndall*.—Touching the warranty,

if a disseisor continues possession 20 years, and the disseisee enters or brings an ejectment, the disseisor shall maintain his possession by the statute of limitations; for he has acquired a *ius possessionis*, though not a right to the inheritance; per Holt Ch. J. 11 Mod. 104. S. C.

At this day peaceable possession for 20 years tells an entry, and after such possession a release of actions gives a right, and there is no remedy for the fee-simple by writ of right after such possession, and a release of actions. Jenk. 16. pl. 28.—*And that no person, &c. that now hath any * right or title of any entry into any manors, &c. now held from him or them, shall thereinto enter, but within 20 years next after the end of this present sessions of parliament, or within 20 years next after any other title of entry accrued; and that no person, &c. shall at any time hereafter, make any entry into any lands, &c. but within 20 years next after his or their right or title, which shall hereafter first descend or accrue to the same; and in default thereof, such persons so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made; any former law or statute to the contrary notwithstanding.*

ter such possession, and a release of actions. Jenk. 16. pl. 28.—** A. seised in fee having issue two daughters, L. and M. devised his land to B. son of L. in fee, L. being dead at the time of the devise. B. died without issue, and the heir on the part of the father of B. and W. R. the heir of M. enter'd, and took the profits by moieties for 20 years together, thinking the devise void for a moiety. Now the mistake being discovered, C. brought an ejectment against W. R. and upon a special verdict found, it was objected, that the devise was void as to a moiety; but that was over-ruled; and then it was objected, that the bringing this ejectment against W. R. admitted the plaintiff to be out of possession for 20 years, and that then he was barred by the statute. But per Cur. the statute of limitations never runs against a man but where he is actually ousted or disseised; and though one tenant in common may disseise another, it must be by actual disseisin, and not by bare perception of the profits only; but here B. had the whole by devise, and W. R. is a mere stranger; and where two are in possession, the law will adjudge it in him that has the right; and the bringing the ejectment admits nothing. 2 Salk. 423. Hill. 1 Annæ B. R. Reading v. Royston.—If a disseisor dies after five years quiet possession, and the disseisee enter, the heir may maintain ejectment; for the right of possession belongs to the heir, though the meer right be in the disseisee. So if a man enters by wrong, and disseises another, and continues 20 years in quiet possession: yet in these cases, if a writ of right were brought, and the mile joined upon the meer right, the verdict must be for the plaintiff, notwithstanding the statute of limitations. 2 Salk. 685. Pasch. 4 Annæ B. R. Smith v. Tyndall.*

* See (H). S. 2. *Provided nevertheless, That if any person, &c. that is or shall be intituled to such writ or writs, or that hath or shall have such right or title of entry, be or shall be at the time of the said right or title first descended, accrued, come, or fallen * within the age of 21 years, feme covert, non compos mentis, imprisoned or beyond the seas, that then such person, &c. and his and their heir and heirs, shall or may, notwithstanding the said 20 years be expired, bring his action, or make his entry as he might have done before this act: so as such person, &c. or his or their heir and heirs, shall within 10 years next after his and their full age, discovery, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of, and sue for the same, and at no time after the said ten years.*

* See (I. 2) S. 3. *And be it further enacted, That all actions of trespass quare clausum fregit, all actions of trespass, * detinue, action sur ttrover, and replevin, for taking away of goods and chattels, all actions of † account, and upon the || case, other than such accounts as concern the trade of ¶ merchandise between merchant and merchant, their factors or servants, all actions of ** debt grounded*

—† See (O)
—† See (F)
¶ Case by an administrator against executor for money due

upon any lending or contract without specialty: all actions of †† debt for arrearages of rent, and all actions of assault, menace, battery, wounding, and imprisonment, or any of them which shall be su'd or brought at any time after the end of this present sessions of parliament, shall be commenced and su'd within the time and limitation hereafter expressed, and not after (that is to say) the said action upon the case, (other than for slander) and the said actions for account, and the said actions for trespass, debt, detinue, and replevin, for goods or chattels, and the said action of trespass, quare clausum fregit, within three years next after the end of this present sessions of parliament, or within six years next after the cause of such actions or suit, and not after; and the said actions of †† trespass, of assault, battery, wounding, imprisonment, or any of them within one year, next after the end of this present sessions of parliament, or within four years next after the cause of such actions or suit, and not after: and the said actions upon the † case for words, within one year after the end of this present sessions of parliament, or within two years next after the words spoken, and not after.

to the intestate; the defendant [103] pleaded the statute of limitations, the plaintiff replied, that the intestate in his lifetime filed an original in trespass, &c. against the testator within six years after the cause of action did accrue, and that he did not appear, but soon after

ter died, whereupon the intestate recenter, (viz.) on such a day, filed another original against his executor, the now defendant, who appeared, and the intestate declared against him, and that he prosecuted the said first original against the testator, with an intention to declare against him, if he had appeared, and averred that the cause of action did accrue within six years next after the first filing the said first original; and upon a demurrer to this replication, it was objected, that it was ill, because it did not appear, that the original was returned, or made a record in Court; for the plaintiff should have set forth; that the original was delivered to the sheriff to execute, and that the defendant not appearing, the sheriff had returned, that the plaintiff had found pledges to prosecute the writ, (viz. John Doe and Richard Doe) and that the defendant nihil habuit in balliva sua, by which he might be attached; all which was omitted in this replication; and there being no appearances or continuances alleged, the plaintiff ought not to have judgment; but it was otherwise adjudged; for the filing an original had put the case out of the statute, and that it was not necessary for the plaintiff to aver, that the writ was returned, for it shall be so intended, unless the contrary appear on the other side. Nelf. Abr. 1127. Limitation (A) pl. 26. cites 1 Lutw. Rep. 256. *Kinsley v. Heyward*—This judgment was afterwards reversed upon a writ of error, and the reversal was afterwards affirmed in parliament. Ibid.

J. S. gave a promissory note to A. payable on demand; A. died leaving B. his executor, B. within the six years sued out a latitat returnable tres Mich. which was continued to Hill. Term following, and died in the mean time; C. as executor of B. brought action on the note, but not till four years after B.'s death, which was 10 years after the note given, the 6 years being run out at B.'s death; the defendant pleaded the statute of limitations; the whole Court inclined against the plaintiff that the plea was good, but it having been urged by Serjant Chappel, that the Case of *Kinsley v. Heyward*, was denied to be law in the Case of *Letheridge v. Chapman*, Mich. 3 Geo. 2. in C. B. the principal case was adjourned to confer with the judges of C. B. about the resolution in *Letheridge's* Case. Gibb. 170. Mich. 4 Geo. 2. B. R. *Willcox v. Heggins*—Ibid. 289. Trin. 5 Geo. 2. B. R. the Case was argued again, when it was insisted that the note being payable on demand makes it an executory contract and therefore no debt due till a demand; but it was answered, that it is a present duty without a demand, and the difference is, where the debt is to arise upon a collateral act to be done according to the Case of *Cap v. Lancaster*. Cro. E. 548. and so held the whole Court, and Raymond Ch. J. said, the Case of *Letheridge* did not come up to the point; for there the action was brought within 14 months after testator's death, whereas in the principal case 4 years were run out; that in case of abatement by plaintiff's death after the 6 years elapsed the executor, to bring his case within the equity of the statute, must make a recent prosecution; as to which the clause in the statute which provides a year after the reversal of a judgment, &c. may be a good direction; and of the same opinion were the other justices; and by Page and Probyn J. if any thing had happened to have hindered the bringing a new action sooner, as a contest about the will or right of administration, it should have been disclosed in the pleadings; and judgment was for the defendant by the whole Court.—For more of this see (G)

¶ See (F. 2)—** See (I).—†† See (M) pl. 4.—†† See (P) *Aldrich v. Duke*—||| This statute extends not to words which slander a title; per Hide Ch. J. Cro. Car 141. *Law v. Harwood*.—*Scandalum magnatum*, said to have been adjudged in the 1d. *Sav's* Case, not to be within this statute. 21 Jac 16. Cro. Car. 535.—Litt. R. 342. S. C. cited Arg. as agreed.

Six years are limited for action per quod crimen feloniam impesult; but if the action for words be founded on an indictment, or other matter of record, this is not within the statute of limitations, but the action may be brought at any time. Sid. 95. in a note there.

A. filed an original in a plea of trespass upon the Case against B. for monies lent, and died. The executor brought in deb. ass.

[104]
against B. and declar-

ed, as her testator did, defendant pleaded the statute of limitations, to which plaintiff replied as before, that her testator died pendente brevi suo originali, and averred, that defendant had promised, &c. within six years of the said original. Defendant demurred. It was insisted for the plaintiff, that this case was within the equity of this proviso. That if in any of the said suits a judgment given for the plaintiff be arrested after verdict, or if the action be by original, and the defendant be outlawed, and after shall reverse the outlawry, that in all such cases, the plaintiff his heirs, executors, &c. may commence a new action within a year after, &c. - But per Cur. though this is a hard case, yet the statute has not provided for it, and judgment was given for the defendant. Lutw. 261. to 264. Hill. 5 & 6 W. & M. Gargrave v. Every.

S. 4. And nevertheless be it enacted, That if in any the said actions or suits, judgment be given for the plaintiff, and the same be reversed for error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ or bill; or if any the said actions shall be brought by original, and the defendant therein be outlawed, and shall after reverse the outlawry, that in all such cases, the party, plaintiff, his heirs, executors, or administrators as the case shall require, may commence a new action or suit, from time to time, within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after.

S. 5. And be it further enacted, That in all actions of trespass, quare clausum fregit, hereafter be brought, wherein the defendant or defendants shall disclaim in his or their plea, to make any title or claim to the land in which the trespass is by the declaration supposed to be done, and the trespass be by negligence, or involuntary, the defendant or defendants shall be admitted to plead a disclaimer, and that the trespass was by negligence or involuntary, and a tender or offer of sufficient amends for such trespass before the action brought, whereupon, or upon some of them, the plaintiff or plaintiffs shall be enforced to join issue; and if the said issue be found for the defendant or defendants, or the plaintiff or plaintiffs shall be nonsuited, the plaintiff or plaintiffs shall be clearly barred from the said action or actions, and all other suit concerning the same.

S. 6. And be it further enacted, by the authority aforesaid, That in all actions upon the case for slanderous words, to be sued or prosecuted by any person or persons in any the Courts of Record at Westminster, or in any Court whatsoever, that hath power to hold plea of the same, after the end of this present session of parliament; if the jury upon the trial of the issue in such action, or the jury that shall enquire of the damages, do find or assess the damages under 40 shillings, then the plaintiff or plaintiffs in such action shall have and recover only so much costs as the damages so given or assessed amount unto; without any further increase of the same, any law, statute, custom, or usage to the contrary in any wise notwithstanding.

Infant by his guardian brought actions upon

S. 7. Provided nevertheless, and be it further enacted, That if any person or persons, that is or shall be entitled to any such action of trespass, detinue, action sur trover, replevin, actions of account, actions

*actions of debts, actions of trespasss for assault, menace, battery, wounding or imprisonment, actions upon the case for words, be or shall be at the time of any such cause of action given or accrued, fallen, or come within the age of 21 years, feme covert, non compos mentis, imprisoned, or * beyond the seas, that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited, after their coming to, or being of full age, discover, of sane memory, at large, and returned from beyond the seas, as other persons having no such impediment should have done.*

the case upon assumpsit; the defendant pleaded the statute of limitations, and plaintiff demurred; and the question was upon this proviso, which saves

to infants actions of trespasss, &c. and it was urged that trespasss upon the case is not mentioned in this saving. But the Court were of opinion (Ch. J. absente) that this *saving extends to all actions upon the case*, (as without doubt it was intended;) for there is a saving of trespasss generally, and all actions upon the case are trespasss, (scilicet) trespasss upon the case, and it shall be mischievous, if other construction shall be made. Sid. 453. Pasch. 22 Car. 2. B. R. Chandler v. Violet.—S. P. Lutw. 242. Trin. 4 W. & M. Gery v. Coke.—It was argued, that this clause excepts, by reason of infancy, actions on the case for words only, and extends to nothing more. But the Court held it within the equity of the saving clause, though not express'd; for the intention was not to preserve a petty action for words, and not to save an action for a real duty as in this case, and so the plaintiff had judgment. 2 Saund. 120. S. C.—Note, That it was said, that the infant here ought to wait till full age, 6 years being lapsed during his infancy, and that therefore he could not pursue his action, but agreeably to the words of the saving clause of the act, which is (in 6 years after his full age;) but this was not regarded by the Court. And the reporter says, it seems to him that he might well pursue his action at any time within age, though the 6 years are elapsed. Ibid. 121.

An infant after full age, brought an *indeb. ass.* against an executor, on a promise of testator made to the plaintiff in the plaintiff's infancy (and as it is there said Arg. when he was but a day old.) The defendant demurred, because actions on the case are omitted in this proviso; and said, it would be hard after so many years to charge the executor. But the Ch. Justice and 2 J. [105] held, that upon the whole frame of the act, it was strong against defendant, and it would be strange that plaintiff might in this case bring debts and not an *indeb. ass.* and were of opinion, that *actions of trespasss* mentioned in this statute *comprehend this action*; because it is a *trespass upon the case*, and the words of the proviso saves the infant's right in actions of trespasss. And therefore though there are not particular words in the enacting clause which relate to this action, yet this proviso restrains the severity of that clause, and restores the common law, and so to be taken favourably, and it being within the reason with other actions therein mentioned ought also to be within the same remedy. But Ellis J. doubted. But the plaintiff had judgment. 2 Mod. 71. Pasch. 28 Car. 2. C. B. Croser v. Thomlinson.

* In *assumpsit* defendant pleaded non assumpsit infra sex annos; the plaintiff replied, that he was *beyond seas* till such a time, after which he brought the present action such a day; defendant demurred. It was argued, that though assumpsit be not within the letter, yet it is *within the equity* of it; and quando verba sunt specialia, ratio autem generalis, statutum generaliter est intelligendum. And the Court being of this opinion, judgment was given for the plaintiff. Gibb. 81. Trin. 2 & 3 Geo. 2. B. R. Anon.

9. Stat. 10 W. 3. cap. 14. s. 1. No fine or common recovery, nor any judgment in any real or personal action, shall be reversed or avoided for error, unless the writ of error, or suit for the reversing such fine, recovery, or judgment, be brought and prosecuted with effect within twenty years after such fine levied, or such recovery suffered, or judgment signed or entered of record.

S. 2. If any person intitled to such writ of error shall, at the time of such title accrued, be within the age of 21 years, or covert, non compos mentis, imprisoned, or beyond the seas, such person, his or her heirs, executors, or administrators, may bring their writ of error within five years after full age, discovery, coming of sound mind,

mind, enlargement out of prison, or returning from beyond the seas, or death.

10. By 12 & 13 W. 3. cap. 3. No statute of limitation shall bar, where the plaintiff is staid by privilege of parliament.

11. Stat. 4 Ann. cap. 16. s. 16. No claim or entry to be made upon any lands shall be of force to avoid any fine levied with proclamations, or shall be a sufficient entry or claim within the statute 21 Jac. 1. cap. 16. for limitation of actions, unless an action shall be commenced within one year after the making of such entry or claim, and prosecuted with effect.

S. 17. All suits in the Admiralty for seamen's wages shall be commenced within 6 years after the cause of such suits shall accrue.

S. 18. If any person, intitled to such suits for seamen's wages, be within the age of twenty-one years, feme covert, non compos mentis, imprisoned, or beyond the seas, such persons shall be at liberty to bring the same actions, so as they take the same within six years after their being of full age, discover, of sane memory, at large, and returned from beyond the seas.

S. 19. If any person, against whom there shall be any such cause of action for seamen's wages, or against whom there shall be any cause of action of trespass, detinue, action sur trover, or replevin, or of action of account, or upon the case, or of debt grounded upon any lending or contract without specialty, debt for arrearages of rent, or assault, menace, battery, wounding and imprisonment, be at the time of any such cause of action accrued, beyond the seas, such person, who is intitled to such action, shall be at liberty to bring the said actions against such persons after their return from beyond the seas, so as they take the same, after their return from beyond the seas, within such times as are limited for the bringing of the said actions by this act, and by the act 21 Jac. 1. cap. 16.

[106] (B) Prevented, as to Real Actions. By what Acts.

The same point was ruled by Holt Ch. J. at Lent Assizes for Bucks. 12 W. 3. because a possession for 20 years is like a descent, which tolls entry, and gives a right of possession, which is sufficient to maintain an ejectment. Ibid.—S. P. per Holt Ch. J. M. 8. W. 3. B. R. Pullerton v. Warberton.

1. IF A. has had possession of lands for twenty years without interruption, and then B. gets possession, upon which A. is put to his ejectment, though A. is plaintiff, yet the possession of twenty years shall be a good title in him, as if he had still been in possession; ruled per Holt Ch. J. 2 Salk. 421. 1699. Stokes v. Berry.

2. The possession of one jointenant is the possession of the other so as to prevent the statute of limitations. 1 Salk. 285. Hill. 2 Annæ. B. R. Ford v. Grey.

3. A

3. A *claim or entry* to prevent the statute of limitations, must be on the land, unless there are some special reasons to the contrary. Ibid.

(C) Prevented ; as to *Personal Actions*. By what Acts.

1. [If action be commenced in an inferior Court, and then it is removed here by *habeas corpus*, and here they proceed de novo; this commencement there serves to prevent the statute of limitations; per Cur. 1 Sid. 228. Mich. 16 Car. 2. B. R. in Case of Bevin v. Chapman. 12 Mod, 557. cites 1 Sid. 238. S. P. but it should be 228.

2. An *attachment of privilege* is but as a *latitat*, and not as an original. Per Holt Ch. J. Show. 367. Rudd v. Berkenhead.

3. *Infant executor*; plaintiff cannot take advantage of a *suit commenced before by administrator durante minoritate*, to avoid the statute of limitations. Cumb. 428. Estob v. Thorowgood.— But per Powell J. *executor durante minoritate*, and infant executor, make but one executor successively, and such executorship continues till 21, and then he may well have the advantage of the *prosecution of the executor*, during his minority, and so out of the statute; ut ante, in C. B.

4. It hath been adjudged, that the suing out a *latitat* within the time is sufficient to prevent the incurring of the statute of limitation. Carth. 233. in Case of Culliford v. Blandford. But note, the party, who sues out a *latitat*, must

have a *non est inventus* returned by the sheriff, and then he must enter the writ upon the roll, and afterwards file it; otherwise the suing it out will avail him nothing. L. P. R. 19.— But the continuance must be entered, which may be done by an attorney at his chamber. Arg. 12 Mod. 572.— To prevent the statute, it is not enough to take out a writ, even a proper one; but all the continuances, though for six or seven years, must be entered, and so shewn to the Court; for, if there be but an omission of one continuance, it spoils all. 12 Mod. 578.

5. Whether an *original in clausum fregit*, sued out in Dorsetshire above 6 years, and *case brought thereon* within 6 years in London, will prevent the statute of limitations. 12 Mod. 568. Hayward v. Kinsey.

6. In an action on the case the plaintiff laid his damages at 400*l.* defendant pleaded the statute; plaintiff replied, that he sued out a *latitat* for 150*l.* two years before. On demurrer it was insisted for defendant, that these were different actions, for no man would take out a *latitat* for 150*l.* and declare ad damnum 400*l.* It is true, if the plaintiff had averred, it had been one and the same cause of action, it might have been otherwise; and so it was ruled by the Court. 8 Mod. 109. Holloway v. Thurston. Jo. 213. Lamb v. Finch.

(D) *Extends ; to what Things or Actions, touching the Realty.*

1. **A** N annuity is not within the 32 H. 8. of limitations ; per Coke ; and Popham thought the same, if it be by *original grant of annuity* ; but if it be by *grant of a rent-charge, &c.* it is within the statute ; to which opinion of Popham, Fenner and Gawdy agreed. Noy. 37.

2. *Quare impedit*, assise of *darrein presentment*, and writs of *ward* are not within the 32 H. 8. of limitations, and the reason is, that some persons live to 100, and others to 120 years old. Jenk. 205. pl. 34.

As where lands on marriage were settled on trustees,

3. A demand of *money wrongfully received out of lands* is not barred by the statute of limitations, where the *estate in law is in trustees*. 9 Mod. 33. Trin. 9 Geo. 1. Lawly v. Lawly. with a *proviso*, that if the wife should survive, the trustees should permit her to receive the rents and profits during her life, as the same were at that time let. Her husband let the lands at an advanced rent, and died ; and the wife received such advanced rent for several years, and died. Upon a bill by the heir of the husband against the wife's executor, he answered, That if the wife received more than she ought, it was above 14 years since, and so pleaded the statute of limitations. But the plea was disallowed. Ibid.

4. *Thirty years possession of a cotage* is a good title against the lord of a manor, by virtue of the statute of limitations, if he should bring an *ejectment* to recover the possession. Per Cur, 8 Mod. 287. Trin. 10 Geo. 1. in Case of the King v. Wilby Parishioners.

Admitted by the other side, that that statute could not be

5. The Court of Exchequer would not allow a plea of the statute of limitations to be a good bar to a bill for *tithes*. Arg. said to have been in Hill. 12 Geo. 1. G. Equ. R. 228. extended to a demand for tithes. Ibid. 229.—And per Gilbert Ch. B. the reason is, that tithes were not of the nature of those demands intended to be barred by the statute. Ibid.

(E) *Extends to what Things or Actions in general, touching the Personalty.*

1. **P**urchase money is barrable by the statute of limitations. Chan. R. 76. 9 Car. 1. Kennedy v. Vanlore.

S. P. Lev. 101. in Case of Jones v. Pope.—Sid. 305. S. P. in S. C.

2. *Debt upon the statute 2 E. 6.* for carrying away his corn, the *tythes* not being let out, from 20 Jac. until 11 Car. The defendant pleaded for the last three years non debet, and for the residue the statute of 21 Jac. 16. Plaintiff demurred. Per tot. Cur. the statute does not extend to this action. Cro. C. 513. Mich. 14 Car. B. R. Talory v. Jackson.

N. Ch. R. 75. S. C.—3 Ch. R. 8. S. C.—

3. Bill was to have an account of *monies received by the defendants*, being *prothonotaries of the King's Bench*, which was alleged to belong to the Ch. J. and which monies they by their office

office ought to receive for the Ch. J. by an implied trust *virtute officii*. The defendant pleaded the statute of limitations, 21 Jac. 16. Upon the arguing this plea, it was insisted by the plaintiff's counsel, that this trust was not within the said statute. 1 Chan. Cases, 20. Heath v. Henly and Whitwick.

So where bill was to have an account of money delivered by A. (whose executor the

plaintiff was) to the defendant, to compound for A.'s estate, (sequestered for delinquency.) And in Trin. Vacation, 16 Car. 2. the Case being heard by the Lord Chancellor, Justice Twisden, and Wyndham, they declared, and were of opinion, that the statute of limitations did not bar this suit because it was on a trust that the defendant had the money for which the account was sought. But for another reason the bill was dismissed. 1 Chan. Cases, 26. Sheldon v. Welldman.

4. In *debt for an escape*, the defendant pleaded the statute of limitations; plaintiff demurred, because it is not pleadable in this case, it *not being debt upon a lending or contract*, as the statute speaks, *but is founded upon a tort*, as action of debt for tithes, in which it was said, that the statute has oftentimes been adjudged not to be pleadable: but then an incurable fault was found in the declaration, which counted only upon the writ and escape, and omitted the judgment; upon which the plaintiff prayed leave to discontinue, which was granted, though after argument; for the sheriff shall not go unpunished for the escape, by default of the declaration. Lev. 191. Mich. 18 Car. 2. B. R. Jones v. Pope.

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Sid. 305. S. C. and it was argued and agreed, that actions founded upon a statute, as that of debt for tithes, &c. are not within the statute of limitations; and for that rea-

son this of debt for escape is not; for such action was not at common law, but was given by the statute of R. 2. *But action on the case for escape lay at common law, and therefore is within the statute of limitations*, but not debt for escape. Nor can it be within the clause of the statute above, because the action *arises ex maleficio, and not ex contractu*.—S. C. though it was insisted, that if the action was not founded upon lending, or contract properly, yet the law had made it a contract, and the statute intended to limit all actions of debt founded on contract without specialty, and has not distinguished between *contracts in law*, and *contracts in deed*, but includes all; and though it was further insisted, that this action is not founded only upon the statute 1 R. 2. cap. 12. but upon the escape, which is a naked matter of fact; for though the *statute*, and also the *judgment and writ of execution, are of record, and so specialties*, yet the escape, upon which the action is founded, is mere matter of fact; for if the action be founded upon record, then the defendant cannot plead nil debet; because that is no plea to a specialty, and that without doubt he might plead nil debet; and that therefore the plea seemed good. But notwithstanding, the Court held the plea ill, and that the action was not within the statute of limitations. Saund. 37, 38. S. C.

5. The statute intends to limit only those actions, which arise upon a *naked contract*, without any writing under seal. 2 Sand. 65. Hill. 21 & 22 Car. 2. in Case of Hodsdon v. Harridge.

6. *Assumpsit as assignee of commissioners of bankrupts*, for a debt due by contract to the bankrupt; the defendant pleaded non assumpsit infra sex annos; plaintiff demurred. It was argued, that the statute of limitations extends not to this case, it being a *debt assigned by virtue of an act of parliament*; and said, that it was so adjudged in 1653. Upon which day was given to produce the record. But after, for a fault in the declaration, the plaintiff, by licence of the Court, discontinued. 2 Lev. 166. Hill. 27 & 28 Car. 2. B. R. Coply v. Dockminique.

In case by assignee, it was insisted for the plaintiff, that the assignment and promise, which give a new cause of action, are within the six years,

and the assignees shall have a new six years. But Curia contra, and that the six years shall be accounted from the original cause of action, and the *new promise is but a fiction in law*. The Court inclined to give judgment for the defendant, but a discontinuance was granted, &c. Comb. 70. Mich. 3 Jac. 2. B. R. Ashbrooke v. Manby.

• 7. The

7. The statute of limitations of personal actions extends to *indebitatus assumpsit*. 2 Mod. 71. Pasch. 28 Car. 2. C. B.

But such plea was allowed, and the plaintiff moved to discontinue,

8. Ld. Ch. J. North said, he had known it resolved, that the statute of limitations is not a good plea to an action brought by an attorney for his fees; because they depend upon a record here, and are certain. Pasch. 29 Car. 2. C. B. Mod. 246. in pl. 5. which was granted. Carth. 144. Trin. 2 W & M. B. R. Rudd v. Berkenhead — In assumpsit by attorney for his fees, and money disbursed, and labour and pains in prosecuting diverse suits, the defendant pleaded the statute; plaintiff demurred. It was argued for the plaintiff, that this action being by several declarations, the one for fees only, and the other for money expended, and labour and pains in the prosecution, the statute is not pleadable to that which is for fees only; because it arises by matter of record. But per tot. Cur. the statute is pleadable as to the declaration for the fees; for the fees are not of record, and a case cited, where it had been so adjudged in this Court, within two years before. And thereupon judgment was given generally in the principal Case. 3 Lev. 367. Trin. 5 W. & M. C. B. Oliver v. Thomas.

9. *Damage cleer* is within the statute 21 Jac. because it arises out of the action, and is not grounded on the record. Raym. 243. Mich. 29 Car. 2. C. B. Barbe v. Burton.

3 Salk. 228.

—* Ch.

Cases 26.

Mich. 15

Car. 2.—

+ Vern. 256.

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R. 343.—Hut. 109.

10. Statute of limitations enumerates the actions it limits, and they are all suits at common law. It is no bar to a suit in equity upon a * trust, not for a † legacy, nor for a ‡ rationabile parte bonorum. 6 Mod 25. Mich. 2 Annæ. B. R.

Mich. 1684. Parker v. Ash. — The reason why a legacy is out of the statute is because it may be stopped till debts are paid. Per Holt Ch. J. 11 Mod. 44. — † Litt. R. 343.—Hut. 109.

See (A) pl.

8. S. 3.

11. In the case of *seamen*, the duty does not arise from the contract, but from the service done; and therefore, though the contract were above six years, and any part of the service within that time, it is out of the statute of limitations. 6 Mod. 26. Mich. 2 Annæ, in a note there.

See (A) pl.

8. S. 3.

(F) Accounts.

S. P. Nelf.

Ch. R. 76.

in S. C.—

1. *Guardian* [his account] is within the statute. Arg. Chan. Cases, 20. Pasch. 15 Car. 2. in Case of Heath v. Henly.

If one receives the profits of an infant's estate, and six years after his coming of age he brings a bill for an account, the statute of limitations is as much a bar to such a suit, as if he had brought an action of account at common law; for this receipt of the profits of an infant's estate is not such a trust, as (being a creature of the Court of equity,) the statute shall be no bar to; for he might have had his action of account against him at law; and therefore no necessity to come into this Court for the account; for the reason, why bills for an account are brought here, is from the nature of the demand; and that they may have a discovery of books, papers, and the parties oath for the more easy taking of the account which cannot be so well done at law; but if the infant lies by for 6 years after he comes of age, as he is barred of his action of account at law, so shall he be of his remedy in this Court; and there is no sort of difference in reason between the two cases. Trin. 1729. Abr. Equ. Cases, 304. Lockey v. Lockey.

2. *Insimul computasset* brought for a sum certain upon an account stated, though between merchants, is not within the exception. 1 Mod. 71. Mich. 22 Car. 2. B. R. Martin v. Delboe.

3. Ac-

3. Account *stated*, but carried over to a new account, is slipped out of the statute. 1 Mod. 270. Trin. 29 Car. 2. C. B. per North, in Case of Farrington v. Lee.

Statute of limitations is not pleadable where there was a

current account; but if it were a *stated account* above 6 years ago, it is pleadable to it. 12 Mod. 579. Mich. 13 W. 3. Cudmore v. Ellis.

4. The statute of limitations is no plea in bar in an *open account*; per Jeffries C. Vern. 456. Pasch. 1687. Scudemore v. White.

(F. 2) Accounts between Merchants.

See (A) pl. 8. S. 3.

1. *Account was made* between A. and B. both merchants; B. confessed 1200*l.* to be arrear, but A. claimed more; *before the account was intirely ended A. died*, and his executor filed a bill in chancery against B. and he pleaded in bar the statute of limitations of 21 Jac. This matter was referred to three judges who certified that it was no bar; because the account was not ended, and also because it was between merchants. Jo. 401. Mich. 13 Car. Sandys v. Bloodwell.

2. The exception as to merchant's accounts in 21 Jac. 16. extends only to *merchants trading beyond sea*, and not to inland merchants. Chan Cases 152, Mich. 21 Car. 2. Sherman v. Withers.

3. Accounts *stated* between merchants are not within the proviso of the statute 21 Jac. but accounts *current*; per three justices, absente Keeling, but adjournatur. Lev. 287. Pasch. 22 Car. 2. B. R. Webber v. Tyrrel.

Vent. 91. cites S. C. (as it seems) by the name of Webber v. Petit.—
Saund. 127.

S. C. by the name of Webber v. TIVILL adjudged for the defendant.

4. Case &c. in which the plaintiff set forth, that the defendant was a merchant, and *sent several goods beyond sea, and promised, that if the plaintiff would give him so much money, he the defendant, would give him so much out of the neat proceed of such a parcel of goods &c.* The defendant pleaded, *that the cause of action did not arise within six years*; and upon a demurrer this was adjudged a good plea; it is true, the statute is not pleadable to an account *current* between merchants, but it is to an *account stated*, as this is. Nels. Abr. 1125. Limitation pl. 13. cites 1 Mod. 70. Martin v. Delboe;

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The defendant pleaded the statute of limitations, but did not say that non assumpsit *infra sex annos*, but that the cause of action did not arise within

fix years; it was insisted that this was a sum certain, and that the cause of action arose from the time of the ships coming into the port, and the fix years are to be reckoned from that time; Twisden said, he never knew that the word (accounts) in the statute was taken only for action of account, and that an *infirmul computasset* brought for a sum certain upon a *stated account*, though between merchants, is not within the exception; so judgment was given for the defendant. 1 Mod. 70. Mich. 22 Car. 2. B. R. MARTIN v. DELBOE; and this is all that is there, which seems somewhat obscure. But the S. C. reported. Vent. 89. sets forth, that after the return of the ship the defendant with some other owners made up an account of the merchandize returned in the said ship amounting to 9000*l.* whereof the plaintiff's share was 1700*l.* which he demanded of the defendant and that he refused to pay it, &c. Kelyng and Rainsford were of opinion, that here being no account stated between the plaintiff and defendant it was directly within the statute; but Twisden inclined otherwise, because the plaintiff declared upon an account stated, and though that was between strangers,

strangers, yet he by bringing his action upon it admits it, et adjournatur.—It is added there (by the editor as it seems) that judgment was for the defendant and cites 1 Mod. 70, 71. for his authority.—Sid. 465. reports S. C. and that the doubt was, whether this was an account stated, it not being made between plaintiff and defendant; the Court did not deny the difference between stated and unstated accounts between merchants, as to the being or not being within the statute, but would advise upon the pleading, viz. whether it thereby appeared that there be an account stated.—S. C. Lev. 298. Mich. 22 Car. 2. B. R. reports the doubt as above, and that the plaintiff afterwards prayed *leave to discontinue*, and had it, though after argument.

S. P. by North. Mod. 270. Trin. 29 Car. 2. C. B. in S. C. by name of Farrington v. Lee. 5. Where a *merchant's account* is once *stated* the plaintiff must bring his action within six years; but if it be adjusted, and a *following account is added*, there the plaintiff is not barred, because it is a running account. 2 Mod. 312. Trin. 30 Car. 2. B. R. Parrington v. Lee.

4 Mod. 105. —Carth. 3. Renew v. Axton. — So bills of exchange for value received. 6. *Bills of exchange* and other transactions between merchants are not excepted out of the statute of limitations, but only an action of *account*. Show. 341. Mich. 3 W. & M. Cheevly v. Bond. Carth. 226. Cheevly v. Bond.—Statute excepts only *accounts current between merchants*, and not accounts *stated*; if an action is brought against a drawer for value received, this is no account current, but *stated*. 4 Mod. 105. Pasch. 4 W. & M. B. R. S. C. Jo. 401. Vent. 20. cites Webber v. Pettit.

7. *Forbearance of suit for 20 years* will be a good bar in *equity*, though in a demand by one merchant against another; and though the statute has always been construed to except accounts between merchant and merchant, yet that is to be understood with this distinction, that if *open accounts are by subsequent acts continued*, they are not barred by the intervention of such length of time from the original transaction; but if *such account is deserted* by the complainant, it is in such case barred; and the plea of acquiescence and also of the statute of limitation allowed. G. Eq. R. 224. Hill. 12 Geo. Bridges v. Mitchell.

See (A) pl. 3. S. 3. and in notes.

(G) Actions on the Case.

1. A *Stumpfit to indemnify*; resolved that though parcel of the damnification was before six years of the action brought, and other *parcel* within six years, that the action well lies, notwithstanding the statute. 21 Jac. 16. Jo. 330. Hill. 9 Car. B. R. Peck v. Ambler.

[111] 2. *Debt upon escape* is out of the statute of limitation. 1 Sand. 37. Mich. 18 Car. Jones v. Pope.—But an *action on the case* for escape is not. Sid. 305. S. C.

3. A *judgment in France* is to be considered here only as a simple contract debt, and is within the statute of limitations. 2 Vern. 540. Hill. 1705. Duplein v. De Roven.

4. In action *sur case* against an executor, plaintiff *declares*, that upon a marriage treaty, it was agreed between the plaintiff and

and testator to pay the plaintiff 100l. and whilst that should be unpaid, he should pay 10l. a year; 28 years after the agreement made, the plaintiff brought action for all the arrears; the defendant pleaded the statute of limitations, whereupon the plaintiff demurred; it was moved, that all could not be barred by the statute; and judgment was given for the plaintiff, no counsel being retained for the defendant. All. 62. Pasch. 24 Car. B. R. Harvy v. Thorn.

(H) *Beyond Sea, Infants, Feme Covert, Persons Imprisoned, Non Compos.* See (A) pl. 8. S. 2.

1. *P*romise to an infant six years after infancy is allowed. See 2 Mod. 71. Pasch. 28 Car. 2. C. B. Croser v. Tomlinson.

2. A. brought an action upon the case upon an indebitatus assumpsit for wares sold; B. pleaded the statute of limitation of actions in bar; A. replied, that he is a merchant, and was in Ireland, and did not return thence till such a time, and shews precisely when, and that within six years after his return he brought this action; upon this replication B. demurred; and upon the demurrer, judgment was given for A.—B. brought a writ of error to reverse this judgment and assigned for error. 1st. That the replication of A. upon which the demurrer was joined is double; for first he alledgeth, that he is a merchant, and so is a person out of the statute of limitations: and 2dly, he shews that he brought his action within six years after his return, which is needless. 2dly, He saith, that he did not return into England, whereas the statute is general; if he return, and he may return into Wales; but to that the Court answered, that to return into England, or into Wales, was all one as to the intent of the statute. 3dly. The action was an action upon the case, and that action is not mentioned in the statute; but Roll. Ch. J. said, this is no new case; for it hath been ruled that an action upon the case is within the statute; Jerman J. said, the proviso of the statute is intended to be as large as the body of the act, Nicholas J. to the same effect, and said, that the word trespass mentioned in the act doth comprise in it an action upon the case; the judgment was affirmed. Nisi. Sti. 230. Trin. 1649. B. R. Robinson v. Walker.

3. A. was *falsely imprisoned for 13 years together*; the statute of limitations shall not run upon him whilst in prison; but he shall have six years to bring his action after enlargement; so though the wounding was above six years ago. Cumb. 26. Trin. 2 Jac. 2. B. R. Aldrish v. Duke.—3 Mod. 110. S. C.

4. Statute 4 & 5 Annæ. 16. alters the law in case of limitations as to *defendant's being beyond sea*, so that now the limitation is prevented by it. 2 Salk. 420. Trin. 1 W. & M.

5. Tref-

In *assumpsit* defendant pleaded non assumpsit infra sex annos; the plaintiff replied that the debt was [112] contracted at Teneriff ultra mare viz. in parochia & warda prædict. (de Cheap London) and

that within six years after his return he brought the action; it was urged, that this case is not within the statute, which saves the action till the defendant returns; but here it is founded upon the return of the plaintiff which is not mentioned in the statute; but per Cur. it is within the reason and intent of the statute, and gave judgment for the plaintiff. Lev. 143. Mich. 16 Car. 2. B. R. Beven v. Clapham.—Sid. 228. S. C. but this point is not mentioned there.—As to the pleading the statute of limitations the absence of the defendant is not material; for the act of 21 Jac. 16. provides only for the absence of the plaintiff, per Cur. Hard. 502. Mich. 20 Car. in the Exchequer in Case of Berkley v. Morrice.

See (A) pl. 8. S. 3.

(I) Debt.

1. **DEBT** upon tally is not within the statute of limitations; per Windham J. Sid. 306. Mich. 18 Car. 2. B. R. in Case of Jones v. Pope.

2. Statute of limitations does not extend to *debts upon copyhold fine*. 1 Lev. 273. Trin. 21 Car. B. R. in Case of HODGSON v. HARRIS. Per Twisden J. said that it had been so adjudged.

S. C. Lev. 273. the Court inclined, that it was not within the statute, but adjournatur.—2 Saund. 64. S. C. and after 2 arguments the Court resolved for the plaintiff, viz. Kelynge Ch. J. principally, that there was a sufficient specialty to

prevent the statute of limitations, and Twisden J. principally that this action was not within the limitation of the statute, because it was not founded upon any lending or contract, the other justices consenting to both points; and so a rule was given for judgment for the plaintiff, nisi, &c. and afterwards the rule was made absolute, and the plaintiff had his judgment accordingly; whereupon the defendant brought a writ of error, but afterwards was nonsuit as the reporter, who was counsel for the

3. Submission to an arbitrement was by parol, and debt was brought for 15*l.* upon award in writing under seal; the defendant pleaded the statute 21 Jac. 16. and said, that it was *not brought within three years*; and upon a demurrer the doubt was, whether debt upon award be within the said statute, the words of which are to this purpose; actions of debt *grounded upon any lending or contract without specialty*; the Court were of opinion, that debt upon award is not within the said statute; and they did not ground their opinion upon the writing and sealing, because this did not make it a deed; but because *this is no action, which is grounded upon lending or contract*, which debts are only within this statute; and the next term the defendant perceiving the opinion of the Court agreed to waive the plea above, and pleaded a new issuable plea. Sid. 415. Pasch. 21 Car. 2. B. R. Hodsdon v. Harridge.

the cause for the plaintiff, said it was related to him. Ibid. 67.——The action must be brought for the money awarded and not upon the assumpsit to stand to the award; per Holt Ch. J. 11 Mod. 44.

4. The statute of limitations does not extend to *debt on the* S. P. Sid. 415. in Case of Hodesden v. Harridge. 2 E. 6. for not setting out of tythes, because *oritur ex maleficio*. Mod. 246. Pasch. 29 Car. 2. C. B. in Case of Cockram v. Welby.

5. Case was brought against a sheriff, for that he levied such a sum of money upon a *fi. fa.* at the plaintiff's suit, and did not bring it into Court at the return of the writ; per quod deterioratus est &c. Defendant pleaded the statute 21 Jac. 16. It was insisted, that this is within the statute; because it is *ex quasi contractu*; to which it was answered on the other side, that this action was not brought upon the contract, but that if they had brought an *indeb. ass.* then the plaintiff had grounded himself on the contract and there had been more colour to bring him within the statute; but that this was action on the case for not having the money here at the day, per quod &c. North said that *indeb. ass.* would lie in this case against the sheriff, or his executors, and then the statute had been pleadable; and in the next Trin. Term the plaintiff had judgment *nisi causa* &c. If the *fi. fa.* had been returned, then the action would have been grounded upon the record and it was the sheriff's fault that the writ was not returned; but that however the judgment in this Court is the foundation of the action. Mod. 245, 246. Pasch. 29 Car. 2. C. B. Cockram v. Welby.

And in an action of debt brought by the same plaintiff against the same defendant it was held upon demurrer, that debt did lie against the sheriff

[113] for the money before the return of the writ, and that this action is not within the statute of limitations; for though it be not a

matter of record till the writ returned, yet it is founded on a record and has a strong relation to it. 2 Show. 79. Trin. 31 Car. B. R. Cockram v. Welbye.

(I. 2) Detinue.

See (A) pl. 8. S. 3.

1. Plaintiff brought a writ *de rationabili parte bonorum*, and counted of custom in the county of Nottingham, and shewed all specially, and the conclusion was, that he *detaineth particular goods of the party plaintiff*, which appertained to him as his part and portion; and upon *non detinet* pleaded, it was found that the plaintiff was intitled to this action many years before the statute of 21 Jac. and that he had not brought his action within the time limited by the said statute; and upon the special verdict, the case being argued by Serjeant Ward for the plaintiff, it was adjudged for the plaintiff. Hutt. 109. Trin. 6 Car. Shervin v. Cartwright.

It was resolved that this is an original writ in the register, and though it concludes upon the detinue, yet it is not *detinue*, and therefore is not within the statute

of 21 Jac. which was made with intent to limit usual actions; and therefore judgment for the plaintiff. Litt. R. 341. Trin. 6 Car. C. B. S. C. by name of Shervin v. the Executors of his father. 6 Mod. 25, 26. Arg. S. P. and says the reason given why a *rationabili parte bonorum* is not barred by the statute of limitations is, because it is not a common law proceeding, but according to a particular custom.

(K) Error.

1. **BY** 10 & 11 W. 3. 14. *no fine, common recovery, or judgment shall be reversed for error unless the writ or suit be commenced and prosecuted with effect within 20 years after, provided that persons disabled, as infants &c. his heirs, executors, &c. may have writ of error within 5 years after such disability removed.*

(L) Formedon.

See (A) pl.
6 S. 4. and
pl. 8. S. 1.

Bendl. 193.
S. C.—D.

278. a. pl.

2. S. C. and

3 justices

held, that

this forme-

don in de-

scender is

out of the

statute of

32 H. 8.

and the sei-

fin of the

donee never

was traversable,

nor intended

to be within

the antient

statute of

limitations;

for the

formedon was

given 10 years

after making

the statute of

Westminster

1. but Welsh

J. doubted,

and

afterwards

the demandant

had judgment.

1. **I**N formedon the demandant *declared of a gift to his ancestor in tail, who was seised in time of H. 6. and conveyed the descent to R. and alleged that he died within 50 years, and from R. alleged the descent to the demandant; the tenant demurred, because the seisin was not alleged within 60 years according to the statute; but adjudged for the demandant; because formedon is not a writ of right; for it lies of rent which a writ of right does not, and formedon is founded upon the gift, which must necessarily be shewn.* And. 16. pl. 33. Mich. 10 & 11 Eliz. *Whitton v. Sir H. Compton.*

[114]

2. In writ of formedon *in the reverter, or remainder, or sci. fa. upon a fine of such nature,* the demandant need not *allege* either in the writ or count any limitation by the statute of 32 H. 8. viz. within 50 years after the title, &c. in as much as before that time no limitation was mentioned in such writs, nor in formedon in descender; but this comes of the part of the tenant to be traversed as in avowry, viz. not seised of the services after the limitation. D. 315. b. pl. 101. Mich. 14 & 15 Eliz. Anon.

For this is a new right which he had not before; and though where a man releases his right he cannot pursue his action or remedy, yet if he a right

3. *Discontinuance by tenant in tail by fine sur concessit for three lives of A. B. and C. and another fine afterwards to the use of himself and his heirs is no bar to the issue by statute 21 Jac. 1. 16. of limitations, though 20 years were passed after right of action, viz. formedon accrued: for though he was barred of this action after 20 years passed, yet he has title of entry only after the discontinuance for three lives determined, and he shall have 20 years to enter after his title of entry accrued to him, which in this case was by the determination of the lease for three lives.* Lutw. 781. *Hunt v. Bourn.*

and several remedies, the discharge of one is not a discharge of the other, and though 4 H. 7. of fines enures by way of bar to the right yet 21 Jac. 1. 16. enures by way of bar to the remedy, and the word *right* there is a right of entry. 2 Salk. 422. Hill. 1 Annæ. B. R. S. C.

(M) Rent

(M) Rent.

See (A) pl.
6. S. 4. and
8. S. 3.

1. **O**Riginal grant of an *annuity* is not within 32 H. 8. 2. but otherwise if it be by grant of a rent-charge; per Popham, Gaudy and Fenner J. Noy. 37. Dean and Chapter of Rochester v. Bishop of Rochester.

2. *Rents* which were *saved by the statute* of chantries is not within the statute of limitations of H. 8. to be barred by 40 years; per three J. but two held contra. Cro. C. 80. Mich. 3 Car. C. B. Falkner v. Bellingham.—Ibid. 214. S. C. judgment reversed.

3. If *judgment be in a per quæ servitia*, such rent is out of the statute, because there is a *record* thereof. Cro. C. 82. in Case of Falkner v. Bellingham.

4. The words in the stat. 21 Jac. 1. 16. that all actions of *debt, for arrearages of rent* shall be limited, &c. have been construed to extend only to actions of debt for arrears of rent, which was reserved on *lease parol*, and not upon lease in writing. 2 Saund. 66. Hill. 21 & 22 Car. 2. in Case of Hodsdon v. Harridge, cites Hutt. 109. Freeman v. Stacy.

5. The Case in Co. Rep. on the 32 H. 8. concerns only customary rents between lord and tenant, and extends not to any *rent* commencing *by grant*, or whereof the commencement may be shewn; per Cur. 2 Vern. 235. Trin. 1691. Collins v. Goodall.

(N) Seisin.

See (A) pl.
6. S. 3.

1. **A** College brought a writ of right, and it was moved, whether it should count of its seisin within 30 years, because the *corporation never dies*, and then if he count of his own possession, the same is without limitation. And it was held, That if the *guardian of the college was ever seised*, he ought to count upon a seisin within 30 years; but upon the *seisin of his predecessor*, he ought to count of a seisin within 60 years, as another common person; for the change of the teste of such a seisin is as the dying seised and descent of a common person. Le. 153. Trin. 31 Eliz. C. B. All Souls Scholars in Oxford v. Tamworth.

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(O) Trespass, Trover, &c.

See (A) pl.
8. S. 3.

1. **T**ROVER was brought of a ship. The defendant pleaded statute of 21 Jac. cap. 16. The plaintiff replied, that the *ship was delivered to the defendant, at Tunis ultra mare, to re-deliver it when required, and that defendant sold the ship at Tunis, &c. and continued there till 3 Car. and then came to England, and the plaintiff*

S. C. Cro.
C. 24.
Hill. 7 Car.
B. & and
i id. 333.
And it was
agreed una

voce, that trover is within the statute, and is within the general words of actions upon the case, and in the last proviso it is expressly mentioned. As to the point of defendants being beyond sea being within this statute or not, the Court was divided, in case the plaintiff did not file an original.— And 3 justices held, that when it is alleged, that defendant returned from beyond seas *Primo Caroli*, and that *Tertio Caroli* the plaintiff required the delivery and he refused,

and afterwards the said first day of October converted them to his own proper use, it shall be intended that the said goods came a second time to defendant's hands, and that they being in his hands the plaintiff required the delivery of them, and that afterwards the same day, he converted them, and that upon this conversion the plaintiff had grounded his action, and the plaintiff had election, upon which conversion he would bring his action; and then he is clearly out of the said stat. of 21 Jacobi, the action being brought within two years after the last conversion, and so well brought; but Croke doubted, how this action should be maintained without shewing how they came to the defendant's hands, where it is allowed, that once he sold them in 19 Jacobi, and converted the money to his proper use; and the allegation, that he after refused to deliver, and converted them to his proper use, without shewing how he came to them, cannot be good. But the other three justices being against him they gave rule, that judgment should be entered for the plaintiff, unless, &c. *C. 334. Mich. 9 Car. B. R. Swayn v. Stephens.*

tiff requested the delivery and he refused, but converted after to his own use, &c. Defendant demurred, and Whitlock and Jones J. held, that the action well lies. For when one delivers goods to one to be re-delivered when required, and the party converts it to an use, and after he comes to the possession of it again, and converts it to his use again, if in this case the first conversion was before the time of limitation, and the other after the time, the plaintiff may have action upon the last conversion, and is not bound by the statute. For the owner of the goods has election, upon which conversion to bring the action; but if the time of limitation be passed, he can not have detinue for the goods, because the cause of action of detinue was presently after time of delivery, and so the time to bring action was gone; but in this case, the owner may seize the goods though barred of action. 2. It was said, that the conversion *ultra mare* is not of necessity to be taken as conversion against the plaintiff. 3. It was not the intention of the statute, that the plaintiff should be ty'd to bring action upon the conversion *ultra [mare]* and be ty'd to a time, when he cannot have action against the party (he being *ultra mare*), and therefore they thought that when the party comes into England, and he is then required to deliver it and he denies, but converted it before to his own use, and this within the time of limitation, that the action was well brought; but Croke (*absente Richardson*) e contra. But it was adjudged for the plaintiff. After, in Easter Term, the case was moved again, when Richardson was present, and he was of opinion with Croke, whereupon judgment was prayed, but it was not agreed by all for the first point, that the statute of limitations does not bar the plaintiff of his action, when the defendant was *ultra mare*, according to the opinion of Whitlock and Jones. Jo. 152. Hill. 7 Car. B. R. *Swayne v. Stevens.*

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(P) Time limited. How to be computed.

1. **BOND** to make assurance of land, and if obligee refuses to accept the assurance, and shall make request to have 100l. in satisfaction of it, then if upon such request within 5 months after he pay the 100l. that then, &c. at the day he refuses the assurance, and 10 years afterwards he makes request to have

have the 100l. it was held, that a request at any time during his life was good. Cro. E. 136. Trin. 31 Eliz. B. R. Boyton v. Andrews and Simpson.

2. A. promised B. that if he would make apparel for his wife, and prepare stuff and lace for it, he would pay for the stuff and making, as much as should be required. B. brings assumpsit, and shews that he provided, &c. and the value, &c. and that he required A. such a day to pay him, which was within 6 years before the action; but the promise was laid to be 7 years before. Defendant pleaded the statute, and that plaintiff did not bring his action within the 6 years after the promise. Upon a demurrer, Richardson J. said, that the action ought to be brought within 3 years after the promise; but by the other 3 justices, the intention of the statute is within 6 years after the cause of suit given, which is not until after request. Het. 138. Hill. 4 Car. C. B. Bill v. Lake.

As if A. promise B. so much what he shall marry his daughter; the 6 years there shall be after the marriage; per 3 J. ib. 139. Or if the promise be of so much after his return from Rome, or other

place, from whence it is not impossible to return within 6 years, the payment shall be after the return, and there is no cause of action before; and also the promise and request are intire; for the request is part of the promise, and the promise is not intire without the request. Ibid.—It was said by Hedley, that there is a difference where the request is necessary, and where it is alleged for form only. As if I sell a horse for 10l. generally, and after the 6 years bring an assumpsit against the vendee, and shew in the declaration, that I was to be paid when I should require it, & licet sapius requisitus, within the 6 years, &c. here I shall be barred; for it was due by the contract, and the request is but formal. Or if a man bring action within the 6 years, and afterwards is non-suited for want of request shewn, when it was necessary, and makes a new request after the 6 years, and brings his action, it is good; which was granted by the Court. Ibid.

3. If a man brings an action within the 6 years, and afterwards is non-suited for want of request shewn, where it is necessary, and makes new request after the 6 years, and brings his action, it is good. Het. 139. Trin. 5 Car. C. B. in Case of Starkey v. Taylor.

4. Action was brought within the time; defendant is outlawed, and the time passes; and after the outlawry is reversed in C. B. for default in the exigent. Resolved, that a new writ brought within a year after this is good by the statute, and so judgment given in C. B. was affirmed. Hill. 8 Car. B. R. Jo. 312. Lamb v. Finch.

Cro. J. 294. S. C. and there Crooke J. conceived that because this outlawry was not reversed by

error, but avoided by plea, the first original is not determined, but he might have proceeded thereupon; and to begin a new original, and in another county, [as in the principal case it was] is not according to the 21 Jac. 16. nor within the intent of the statute. But the other 3 J. held neither the variance in the county, nor in the damages laid (which in one action was to 500l. and in the later action to 600l.) to be material to the action, it being transitory and averred to be for one and the same cause, and that a reversal by any means is sufficient, and within the statute.

5. If an assumpsit be to do a thing on request, as to indemnify, and a damnification accrues not at one time, but parcel at one time and parcel at several times after, in this case plaintiff may have an entire action after the last time of damnification, and though parcel was before the 6 years, and parcel after within the 6 years, yet the action well lies notwithstanding the 21 Jac. 16. Jo. 330. Hill. 9 Car. B. R. Peck v. Ambler.

S. C. cited Arg. Gibb. 289.

S. C. Godb.
437. by
name of
SHUTFORD
versus

[117]
BOROUGH,
adjudged
that the sta-
tute of 21
Jac. is no
bar; and
said, that
it was so
resolved.—
1 Car. B. R.

in PECK'S

Cafe, and Hill. 16 Jac. in BILL and WADE'S Cafe, and the meaning of the statute of 21 Jac. was to bar the plaintiff but from the time that he had a compleat cause of action, and that was not until the request made. And when divers things are to be done and performed before a man can have an action, there all these things ought to be compleated before the action can be brought. And therefore, if a man promise to pay J. S. 10l. when he is married, or when he is returned from Rome, and ten years after the promise J. S. marrieth, or returneth from Rome, because the marriage or the return from Rome are the causes of the action, the party shall have six years after his marriage, or return, to bring his action, although the promise was made ten years before. And in the principal case, the cause of action is the breach, and that cannot be until after the request made; and where the request is material, it ought to be shewed in pleading. And so it was resolved by the whole Court (nemine contradicente) that the action was well brought, and within the time limited by the statute. And judgment was entered for the plaintiff. Godb. 437, 438. Mich. 4 Car. B. R. Shutford and Borough's Cafe.

A promise is to do a thing upon request or notice. The statute of limitations is not pleadable to the promise, but to the request or notice; for the action arises upon the request. 1 Lev. 4^o. Mich. 13 Car. 2. B. R. Web. v. Martin.—Jo. 194, 329. Godb. 437. Shutford v. Borough.—Mod. 89.—Sid. 66. S. C.

7. If an action *for words* is brought within 2 years *after the loss of marriage*, the statute of limitations is not pleadable, tho' the words were spoke ten years before, if the same words are not actionable without the loss of marriage. 1 Lev. 69. Trin. 14 Car. 2. B. R. Littleboy v. Wright.

If a *conversion*
be before 6
years, and
a *conversion*
after, the
statute can-

not be pleaded. Per Cur. Far. 99. Mich. 1 Ann. B. R. Mountague v. Lord Sandwich.

9. The statute of limitations may be pleaded to an action, if the *time be elapsed before the day wherein the bail is filed*, though not before the first day of the term wherein the action is brought; for the action shall not be said to be depending till the bail is filed. Vent. 135. Trin. 23 Car. 2. B. R. Tatlow v. Bateman.—2 Lev. 13. S. C.

2 Show. 493.
S. C. by
name of AL-
DRIDGE v.
DRAKE, ad-
judged for
the plaintiff.—

3 Mod. 110. S. C. by name of ALDRIDGE v. DUKE, adjudged for the plaintiff. And it having been moved in arrest of judgment, that the verdict, being general, was inconsistent with

with the plaintiff's replication; for that is within 6 years, and the verdict finds him guilty of the whole 13 years in the declaration. It was answered, that the defendant having pleaded *not guilty at any time within the 6 years*, if the verdict find him guilty within that time, it is against him. But if he had pleaded *not guilty* generally, then *damages* must be for the 13 years, though the plaintiff of his own shewing had brought his action for a thing done beyond the time limited by the statute. And per Cur. if false imprisonment be for 7 years, and the jury find the defendant guilty but for 2 days, it is a trespass within the declaration. This statute relates to a distinct, and not to a continued act; for after 6 years it will be difficult to prove a trespass. — * N. B. The statute says but 4 years; and as to the pleading thereof, see (S) Blackmore v. Tidderly.

11. So of a wounding, which was above 6 years ago. Comb. 26. in Case of Aldrich v. Duke.

12. Though the cause of action accrues before the grant of administration, yet the administrator shall have 6 years from the time of granting the administration, per Holt Ch. J. Carth. 337. Hill. 6 W. 3. B. R. in Case of Curry v. Stephenson — cites Cro. J. 60, 61. Sandford's Case in Saffin's Case. 4 Mod. 376. S. C. — 2 Salk. 421. S. C. — If there is no executor, the statute will not take place till administration is taken out. 2 Vern. 695. Trin. 1715. Jolliffe v. Pit and Whittier.

13. Count as administrator for money received to the use of baron [118] and feme, as administratrix of A. B. &c. the defendant pleads non assumpsit infra sex annos; the plaintiff replies, and shews that A. B. died such a year and day, and that the defendant received the money immediately after his death, which was more than 6 years passed; but that administration was committed such a year and day, which was *infra sex annos*; upon which the defendant demurred, because it was a departure; the Court seemed to incline, that it not being 6 years after the administration, though the money was received before, yet it would be no bar within the statute, according to the reason of Saffin's Case. Skin. 555. Mich. 6 W. & M. B. R. Curry v. Stevenson.

14. A. gives to B. a note for 100l. payable on demand; this is a present duty, and the difference is, where the debt is to arise on a collateral act to be done. Gibb. 289. Trin. 5 Geo. 2. B. R. Wilcox v. Huggins. Cro. E. 548. Cap v. Lancaster. In an indebit assumpsit, the plaintiff/

declared on a promise to pay on demand; and non assumpsit infra sex annos was pleaded, to which plaintiff demurred; because declaring on a promise on demand, he thought nothing was due till demand; and that defendant should have pleaded non assumpsit infra sex annos after demand, or that no demand was within 6 years. Per Cur. If the promise were for a collateral thing, which would create no debt till demand, it might be so; but here it is an indebitatus assumpsit, which shews a debt at the time of the promise; therefore the plea is good. Jud' nisi pro Def' 12 Mod. 444. Hill 12 W. 3. Collins v. Benning.

(Q) Avoided and Action restored. By what Act.

1. WHERE a man is indebted to another for divers wares, and the debt is superannuated according to the statute of 21 Jac. cap. 16. and afterwards they account together, and the party is found to be indebted unto the other in so much money for such wares, in that case, although the party were without remedy before, yet now he may have debt upon accompt, because

now he is not bound to shew the particulars, but it is sufficient to say, that the defendant was indebted to the plaintiff upon account, pro diversis mercimoniis, &c. Per Reeve and Foster J. Mar. 105. pl. 182. Pasch. 17 Car. White v. Grubbe.

Ch. Prec.
385. Pasch.
1714. An-
drews v.
Brown.—
12 Mod.
557. Mich.
13 W. 3.

2. *A promise of payment within 6 years, though the debt was contracted long before, will evade the statute of limitations. But confession, or † only acknowledgment that he owed the plaintiff so much will not do it. 2 Show. 126. Trin. 32 Car. 2. B. R. Dickson v. Thomson.

in Case of Hayward v. Kinsey.—† Ch. Prec. 386.—An acknowledgement without a promise is an evidence of a new promise. Carth. 471. in Case of Heylin v. Hastings.—A promise after the 6 years brings the matter out of the statute of limitations; *owning the debt* does not go so far, but is evidence of a promise, agreed per all the judges of England. 6 Mod. 309. Mich. 3 Ann. B. R. Dean v. Crane.—† 12 Mod. 224. Heylin v. Hastings.—After the 6 years a promise is made to the executor, who declares of a promise made to the testator: declaration of promise to himself might have been good; but per all the judges of England, the evidence did not maintain the declaration. 6 Mod. 310. Mich. 3 Ann. B. R. Dean v. Crane.—† Salk. 28. Dean v. Crane. 11 Mod. 37. Green v. Crane.—If the defendant do but *own the debt* within 6 years, it is evidence of a new promise. 12 Mod. 577, 578.—But after the 6 years a bare acknowledgment of the debt without a promise to pay, has been ruled not to be sufficient to bring it out of the statute. Chan. Prec. 386. in Case of Andrews v. Brown.

S. C. cited
10 Mod.
314. per
Cur. and
said, that in
that Case
there was an
express pro-

mise, upon which the plaintiff declared, viz. *I deny that I owe you any thing, prove it and I will pay you.*—This promise was after the 6 years, to the executors. Carth. 470. S. C.—12 Mod. 223. S. C. and P.

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4. An executor *durante minoritate* brought an *assumpsit*, and pending it the infant came of age, and brought a new writ *recenter*, to which *non assumpsit infra sex annos* was pleaded, and this matter set forth in the replication, and judgment for the plaintiff. Arg. 12 Mod. 571. Mich. 13 W. 3. in Case of Hayward v. Kensey.—cited as Thoroughgood's Case in C. B. Trin. 8 W. 3. Rot. 370.

5. So if one be *outlawed*, and within 6 years after he reverses it, and then *after the 6 years a new writ is brought*, the statute is no plea. 12 Mod. 571.

Abr. Equ.
Cases 305.
S. C.—A.
gave a pro-
missory note
in 1688,
payable to
J. S. or

bearer, which had been much handed about, and at length came to the hands of the plaintiff. A. became a bankrupt and died, and long after A.'s death, and also after 6 years D. the executor of A. recovered a debt due to A. of 5000 l. and put out an advertisement in the Gazette, for all persons who had any debts owing from A. to come to him and make them out, and they should be paid. J. S. brought a bill against the executor of D. to be paid, and had a decree for 300 l. which was the money due by the note, and interest allowed from the time of the bill brought. Chan. Prec. 385. Pasch. 1714. Andrews v. Brown.

7. If

7. If a debtor by will directs the payment of all his debts, this releases a debt barred by the statute; so that his executors must pay it. Ch. Prec. 385. Pasch. 1714. Andrews v. Brown.

S. P. and though it was insisted that defendant's plea of

the statute was good, and that the law extinguishes the debt; for that a right without a remedy is an absurdity. But Ld. Chancellor said, that the statute is not an extinguishment of the debt, but the same is subsisting in conscience, and that a promise in such case is not to be considered as a new one, but as a re-continuance of the old. Sel. Ch. Cases in Ld. King's time. 57. Trin. 11 Geo. 1. Blackway v. E. of Strafford.

8. If a creditor sues out a *latitat* against J. S. and continues it, and defendant dies, plaintiff may bring a bill in equity against the executor of J. S. and plaintiff need not go on in the old action; and the statute of limitations is no bar. Vid. 2 Vern. R. 695. Trin. 1715. Jolliffe v. Pitt and Whistler.

Carth. 234.

(R) In what Cases the *Statute* must be *pleaded*, or may be *given in Evidence*.

1. **WHEN** it is *apparent within the record, that the action is brought after the 6 years certainly*, the Court said, they did not doubt but the statute ought to be shewn in arrest of judgment. But the doubt is, *whether when a general issue is pleaded in assumpsit or trespass, and it does not appear in the assumpsit or trespass, that it was above the 6 years*, the statute now may be given in evidence. . Het. 139. Hill. 4 Car. C. B. in Case of Bill v. Lake.

2. In assumpsit, after verdict for the plaintiff, it was moved in arrest of judgment, that the promise is alleged to be made beyond the time limited in the statute of 21 Jacobi, and the action is not brought within the time limited thereby; and all the Court held, *if it appear so by the plaintiff's own shewing, that the action is not brought within the time limited by the statute*, the plaintiff cannot maintain his action, but judgment shall be given against him; *or if the contract in the assumpsit or debt be alleged to be within the time limited by the statute; and upon non-debet or non-assumpsit pleaded, it appears upon the evidence, that the assumpsit or contract was beyond the time limited*, the action lies not, and the defendant shall take advantage thereof, if it be *specially found by the jury*. For the statute is in the negative, that he shall not maintain such an action, but within the time limited by the statute; but in the principal case it appeared upon the view of the record, that the action was brought within the time limited; and therefore it was adjudged for the plaintiff. Cro. C. 115. Trin. 4 Car. B. R. Brown v. Hancock.

S. C. Het. 111, S. C. argued, but adjournatur. — Upon a like point, Jones and Whitlock J. conceived that the defendant ought not to have the advantage of this statute, unless he had pleaded [120] it, or had demurred thereupon; because the said statute hath divers

exceptions; so that if it be brought after the time, yet if the plaintiff were an infant or feme covert, &c. it were well enough. But Hide Ch. J. and Croke conceived, forasmuch as it appeareth by the plaintiff's own shewing in his declaration, that it is out of the limitation of the statute; and the statute is in the negative, that it shall not be brought at all, unless it be brought within the time limited by the statute; therefore the defendant shall have advantage thereof by exception, without pleading; whereupon the Court would further advise. Cro. C. 163. Mich.

5 Car. B. R. Trankerley v. Robinson.—So in action *for words* spoke more than two years before, because defendant had admitted the action, and not pleaded the statute 21 Jac. but had pleaded not guilty, Jones and Berkley J. held, that the plaintiff ought to have judgment; because the defendant hath not pleaded the statute of limitations; for there may be divers causes, that he could not bring the action before this time, viz. That he was in prison, or within age, or beyond sea, or that he had sued the defendant to outlawry, and the defendant had reversed the outlawry, and this action brought within a year after the reversing of the outlawry, (as in truth the case was) for then the action is well brought. But Adams moved, that he should have then shewn it in his declaration. But it was adjudged for the plaintiff. Cro. C. 381. Mich. 10 Car. B. R. Stile v. Finch.—S. P. But Jones and Berkeley J. held, that he shall not now have advantage thereof: and Jones said, that he knew it had been so ruled twice in the time of the Lord Lea Chief J. and in time of Sir Randall Crew Ch. J. For otherwise there should be a mischief in this Court more than in another Court in the common bench, where they prosecute by original and outlawry; and if the outlawry be reversed, the statute aids the plaintiff. But here they proceed by latitat, whereby the cause of the action doth not appear, and may peradventure divers years continue by process before the defendant may be arrested; and the plaintiff in his declaration need not shew the cause wherefore he did not commence his suit sooner; for if he should do so, the declaration would be more prolix than would be convenient. But if the defendant pleads the statute 21 Jac. then the plaintiff by the replication ought to shew good cause, why he did not bring his action within the time limited by the statute; otherwise he is barred: for the statute allows of many impediments, viz. infancy, imprisonment, ouster le mere, and others therein mentioned, which shall be sufficient cause, that the action was not brought sooner. But Croke doubted thereof, because by his own shewing it appears that the action is not brought within the time limited by the statute; and the statute is in the negative, that it shall not be brought but within the time; so the Court, ex officio, ought to abate it, unless he had shewn wherefore it was not brought within the time. But by the opinion of the other justices, it was adjudged for the plaintiff, unless other cause, &c. Cro. C. 404, 405. Pasch. 11 Car. B. R. Hawkins v. Billhead.

A promise was made 7 years since, to pay money within three months after. The defendant pleaded *non assumpsit infra sex annos ante exhibitionem billæ*, whereas it should have been *causa actionis non accrevit infra sex annos*; though in this case it appears within the declaration that the time of payment was not within the 6 years before; yet because the defendant had not pleaded it, he cannot have advantage of it. Vent. 191. Hll. 23 & 24 Car. 2. B. R. Puckle v. Moore.—Mod. 89. Mich. 22 Car. 2. B. R. S. P. And though it differs as to the term and year of the king, yet seems to be S. C. and it was there urged, that the *non assumpsit infra sex annos* relates to the time of payment as well as to the promise; but Hale Ch. J. said, that could not be. And Twisden J. said, that if I promise to do a thing upon request, and the promise was made 7 years ago, and the request yesterday, I cannot plead the statute; but if the request was 6 years ago, it must be pleaded specially, viz. That *causa actionis* was above 6 years since.—Formerly it was held, that the party should not take advantage of the statute of limitations without pleading it; but now the law is otherwise; per Cur. 10 Mod. 313. Pasch. 1 Geo. 1. B. R. in Case of Stafford v. Forcer.

3. The plaintiff declares as executor of A. of a promise made 30 years before: the defendant pleads *non assumpsit infra sex annos*. The plaintiff replies, that he assumed within 6 years. The defendant re-joins as before, and issue was joined upon it, and found for the plaintiff. And it was moved in arrest of judgment, because the plaintiff in his replication hath departed from his count, and cited Cro. Car. 228. TYLER v. WATTS. Hide Ch. J. Twisden and Windham J. were for the plaintiff. Because if the defendant had demurred upon the replication, it had been for the defendant; but here he hath joined issue, and therefore good. Keyling J. for the defendant; because the plaintiff ought to have given an account of the time betwixt the time laid in the count and the replication; but after judgment was given for the plaintiff. Raym. 86. Mich. 15 Car. 2. B. R. Lee v. Raynes.

If assumpsit
be brought
upon a pro-
mise 20
years before,

4. The statute of limitations must be pleaded, as all matters of law must which do not go to the gist of action, but to the discharge of it. G. Hist. of C. B. 54.

no benefit shall be had of the statute of limitations without pleading it. 1 Lev. 110. Mich. 15 Car. 2.

27 Car. 2. B. R. *Lee v. Rogers*—Formerly it was held, that the parties should not take advantage of the statute of limitations without pleading it. But the law is now otherwise; per Cur. 10 Mod. 313. cites 1 Salk. 28. *Dean v. Crane* and 29. *Heylin v. Hastings*.

5. In debt for rent on *nil debet pleaded*, the statute of limitations may be given *in evidence*; for the statute has made it no debt at the time of the plea pleaded; the words of which are in the present tense; but in case, on non-assumpsit, the *statute of limitations* hath not been given in evidence, for it speaks of a time past, and relates to the time of making the promise. 1 Salk. 278. Anon. Coram Holt Ch. J. at Hertford. 1690.

(S) Pleadings.

1. *WRIT* of right bore teste 20th February, 6 Jac. and the declaration of the explees was alledged in the time of Queen Elizabeth, of the seisin of the demandant himself; whereas, by the statute 32 H. 8. cap. 2. a writ of right of his own seisin cannot be but within 30 years before the writ brought; and this seisin may be before that time, and for that reason the writ is ill, and the judgment given thereupon is erroneous; and for this cause chiefly the judgment was reversed. Cro. J. 293. Mich. 9 Jac. B. R. *Lilburn v. Heron*.

Yelv. 211. S. C. and P. And that if the plaintiff had counted of his own possession in the time of this king generally, it had been good; for it appears to

the Court judicially, that it is within 30 years, in as much as the king has not reigned so long, but Queen Elizabeth reigned 40 years and more.

2. Action on the case was brought, upon a promise to re-deliver such a deed and money upon request, but did not count of any request made; and upon this defendant demurred. And it was moved, that this action lay not without actual request made. And a difference was taken between an action to recover the thing itself only, and an action to recover damages; as plaintiff might have brought detinue for the deed, without any request made before; for the bringing the action amounts to a sufficient request, where only the thing itself is to be recovered. But where the action is to recover damages, there it does not lie, without actual request before made; and of this opinion was all the Court, for which judgment was given against the plaintiff. Sid. 66. Mich. 13 Car. B. R. *Ward v. Martine*.

Keb. 177. S. C. stated, as here, of a promise to deliver a deed, and pay 40 l. on request; but says, that the defendant pleaded non promissit within 6 years, to which the plaintiff demurred, as no good plea

to the one, and good to the other, which on general demurrer by the plaintiff, cannot be good. And ibid. pag. 197. reports, that it was adjudged for the plaintiff. But the Case in Keb. is by the name of *WEBB v. MARTIN*.—S. C. Lev. 48. by name of *WEBB v. MARTIN*. But there it is stated, that the assumpsit was, in consideration of the delivery of a deed by plaintiff to defendant the defendant assumed to re-deliver the deed upon request; and also, in consideration that plaintiff had delivered to him another deed, the defendant promised to pay him 40 l. and alleged the delivery of the first deed; and though such a day after he made request, he had not delivered the first deed, nor paid the 40 l. Defendant pleaded the statute, and that non-assumpsit infra 6 annos before the action brought. Plaintiff demurred, because the cause of action, as to the first, did not arise upon the promise but upon a refusal after request, and the request was within six years, and so held the Court. Then it was moved, that the payment of 40 l. was to be without request, and so the plea good as to that. But it was answered, that the plea being intire to both parts of the declaration, and ill in
• part,

part, is ill in all; upon which it was adjourned. But afterwards the Court held the plea ill in the whole, for the reason alleged. And they cited a Case of *BALDWIN v. LEE* to have been so adjudged, and gave judgment for the plaintiff for all.

S. C. 2 Vent. 197. and resolved, that since the statute is, that those days shall not be any part of [122] the time, therefore pleading non assumpsit infra sex annos, is to be understood of six years, exclusive of those days between 11 Dec. and 13 Feb. S. P. and that of late years, the

general pleading of non assumpsit infra sex annos has been allowed. 2 Vent. 185. Trin. 2 W. & M. C. B. *Godfrey v. Ward*.

3. Assumpsit upon a promise, 1 June, 1 W. & M. the defendant pleaded *non assumpsit infra sex annos ante impetrationem brevis originalis*, upon which the plaintiff demurred; and now it was argued for the plaintiff, that this plea, though it was the usual way of pleading before the statute of the first of this king, by which it is enacted, *That from the 10th of December, (which was the day that King James departed, till the 12th of March, 1688, when the now king assumed the government) shall not be accounted any part of the time, within which any person, by virtue of the statute of limitations, might bring his action, but that he shall have so much allowance of time, as is from the 10th of December, to the 12th of March, for bringing his action, which time contains 92 days, and therefore the plea now ought to be pleaded, non assumpsit infra sex annos, and 92 days; and so it has been pleaded since this statute.* Yet by all the Court the plea is good, and they would not alter the former way of pleading; but if the case be so, that though he has not promised within the 6 years, but has promised within the 6 years and 92 days, this shall come in by the replication. 3 Lev. 283. Trin. 2 W. & M. C. B. *Snodde v. Ward*.

In an indebitat. ass. the replication was of an original in trespass, *quare clausum fregit, ea intentione quod predictus J. C. (the defendant) capiat, &c.* and that the plaintiff might declare against him, &c. It was said to be according to the course of late, to declare in any action upon a clausum fregit, as they do upon a *latitat* in B.

4. In an *indebitat' assumpsit for goods sold*; the defendant pleaded the statute of limitations; the plaintiff replied, that *before the 6 years were out, he brought an original in trespass against the defendant, ea intentione to declare against the defendant, in an assumpsit secund' consuetud'. Cur. de tempore cujus, &c.* The defendant said, that there was *no such record*; and the plaintiff produced an original in trespass, brought within the time, against the defendant and two others, and it was in trespass and assault in London. And it was moved, that this record did not make good the replication. For it is against three, and it should have been in a clausum fregit; for that was said to be the course of the Court, to declare in any thing upon such a writ; but the prothonotary informed the Court, that the original being in London, the cursitor would not make a clausum fregit into London, (for which no reason was given), and that therefore, though in other counties it is to be a clausum fregit, yet trespass and assault would do in this case, and so was the constant practice. And the plaintiff's replication is, that he brought an original in trespass generally; so it may be applied to this, and it is not material, though others be joined in the writ with the defendant. But the Court doubted of the practice. 2 Vent. 193, 194. Trin. 2 W. & M. in C. B. *Norwood v. Woodly*.

R. The Court agreed the practice; but whether this was sufficiently set forth in the replication [was doubted] for it mentions nothing of the course of the Court, but is only, that he prosecuted such a writ.

a writ, *ex intentione*, to declare. And the Court, being informed that there were a great many precedents in this manner, appointed them to be looked into. Et adjournatur. 2 Vent. 259. Mich. 2 W. & M. C. B. Every v. Carter.

5. *Assumpsit for fees due to an attorney*; the defendant pleaded *non assumpsit infra sex annos*. The plaintiff replied, that on such a day, two years before he had sued out an *attachment of privilege* against the defendant, upon which writ, *taliter processum fuit*, that the defendant, (on such a day) in *Hillary Term, anno 2 Will. &c.* appeared, and the plaintiff declared against him *modo & forma, &c.* And upon a demurrer to this replication it was held ill, because the plaintiff did not set forth any *continuance of this writ of attachment, (per vic. non misit breve)* which was sued out above two years ago; for it is impossible that the defendant should appear in *Hillary Term, anno 2 Will.* to a writ returnable two years before, and no other writ is set forth by the plaintiff. But if the plaintiff, after the *taliter processum fuit*, had shewn the last attachment, and the return thereof, upon which in truth the defendant did appear, it had been well enough, without shewing any of the *continuances*. Thereupon the plaintiff moved to discontinue; which was granted. Carth. 144. Trin. 2 W. & M. B. R. Rudd v. Berkenhead.

S. C. 2 Show. 366. Trin. 4 W. & M. adjournatur. And Holt Ch. J. said, that an attachment of privilege is but as a *latitat*, and not as an original.—S. C. and that it must be shewn, that there were continuances till the time of declaring; and a *taliter processum* is not sufficient to shew a

matter before declaration, though it has been held so for matters after. 2 Salk. 420. by name of Budd v. Berkenhead.

6. Trespass for *imprisoning* him, and detaining him in prison, [123] from 32 Car. 2. till the 3d of April 4 Jac. 2. The defendant pleaded as to all, till 34 Car. 2. such a day, *non cul. infra quatuor annos*, and as to the rest, a *plaint and a capias* issued. The plaintiff demurred; et per Cur. though the imprisonment be complained of as one continued imprisonment, yet the defendant may *divide the time*, and plead the statute as to part, and then may reply the continuance; therefore as to this, judgment was given against the plaintiff upon his demurrer, but for him as to the rest; because the *capias* was awarded by the Court *ex officio*, and it did not appear that the defendant meddled with it. 2 Salk. 420. Mich. 3 W. & M. Rot. 411. B. R. Coventry v. Apfley.

7. Where the *duty arises upon consideration executory*, (as a promise to pay at a future day) the plea must *not* be *non assumpsit infra sex annos*, but must be *causa actionis non accrevit infra sex annos*. 2 Salk. 422. Hill, 1 Annæ. B. R. Gould v. Johnson.

See Mod. 70. Martin v. Delbo. Lev. 298. S. C.—10 Mod.

104. Sawkil and Warman.—And 294. Josselyn and Lacier.—Vent. 191. Hill. 23 & 24 Car. 2. B. R. Puckle v. Moor.

8. Holt Ch. J. said, that upon *pleading* the statute of limitations, he always used to plead *the return*, and not the purchase of the writ; for it was the return that gave the possession of the cause to the Court. And if one was to *continue a latitat* for several years, he must get the first returned, upon which return
you

you may make your continuances down, though you never take out another. Farr. 3. Pasch. 1 Annæ. B. R. in Case of Atwood v. Burr.

S. C. 2 Salk. 423, 424. Hill. 3 Ann. B. R. says, that after argument, it was adjudged an ill plea; for if it be considered as at common law, there was no such plea; if on the statute, the act is not pursued, and the defendant could not take issue on

9. Action of *assault and battery*; the defendant *pleads no assault, &c. infra sex annos*, (which by the statute is limited to 4 years) the plaintiff demurs; the defendant joins in demurrer; and per tot. Cur. judgment for the plaintiff. For though this was an *argumentative plea*, viz. that what was not done within 6 years; could not be done within 4 years; yet suppose they had joined issue, and a verdict had been, that it was within 5 years, the Court could not have given judgment for the plaintiff; and should such argumentative pleas be allowed or countenanced, they would inveigle the Court in their judgment; and therefore it was resolved, that the plea of the statute of limitations should be *precise and direct*; for the Court said, there was *no such statute* as to bar an action of assault and battery not done *infra sex annos*; but the statute is express *infra quatuor annos, &c.* Whereupon judgment was given ut supra. 11 Mod. 38. Blackmore v. Titherly.

it; for quod est culp. *infra sex annos* is an issue immaterial; because it may be, the jury might find him not guilty, *infra quatuor annos*, but guilty *infra sex annos*. Judgment for the plaintiff. 2 Salk. 423, 424. Hill. 3 Annæ. B. R. Blackmore v. Titherly.

10. Debt was brought in the Palace Court, and after some proceedings there the *six years expired*; the defendant *sued a habeas corpus*, and removed the cause in B. R. where the plaintiff declared *de novo*, and the defendant pleaded, that the cause of action did not accrue within 6 years before the teste of the habeas corpus; and this was held to be a good plea, but that the plaintiff might reply the suit below, and shew that to have been within the 6 years; not that this suit was a continuance of the suit below, but that the plaintiff had rightfully and legally pursued his right; and it should not be in the power of the defendant, to defeat or hinder him of a remedy, without any default; as where one brings an *action before* the expiration of 6 years, and *dies before judgment*, the *six years being then expired*, this shall not prevent his executor. 2 Salk. 424. Mich. 6 Annæ. B. R. Matthews v. Phillips.

[124] 11. In debt, the plaintiff counted *pro opere & labore*, and that the defendant promised on 1st. of April, to pay upon 1st. of May, &c. Defendant pleaded in bar, *non assumpsit infra sex annos*. Plaintiff replied, that he was beyond sea at the time the action accrued, and that the action was brought within 6 years after his return. Defendant demurred. The question was, Whether the matter, set forth in the replication, brings the plaintiff within the saving clause of the act? The Court was strongly of opinion for the plaintiff; but adjournatur. 10 Mod. 205. Hill. 12 Annæ. B. R. Aubry v. Fortescue.

12. In *assumpsit*, the plaintiff counted, that J. S. who is dead *intestate*, gave a note to him, bearing date the first of December,

1704. reciting, *That whereas W. R. had, at the special instance of J. S. lent to R. S. brother to J. S. 100 l. and whereas R. S. had given bond to repay it on the 2d. June following. J. S. promised, that if R. S. did not repay at the time, he would; and avers, &c.* Defendant pleaded *causa actionis non accrevit, &c.* and verdict for the plaintiff. It was moved in arrest of judgment, that plaintiff could not have judgment; because it appears upon the declaration, that the cause of action accrued above 6 years before the death of J. S. It was urged, that the note was only the form of the promise, and evidence of it; and therefore, if a promise made without a note be capable of continuance, a promise by note must be so too. And also cited Vent. 191. and Raym. 86. But per Cur. there is a difference between declarations upon a parol promise, and a promise by note; in the former, the day is not material, but in the latter it is. The issue here is upon a promise by this very note, and therefore it is impossible in the nature of the thing, that an evidence of a subsequent promise, or a subsequent note, can prove a promise by this note. Formerly it was held, that the parties should not *take advantage of the statute without pleading it*; but now the law is otherwise. And cited the case of *DEAN v. CRANE*, and judgment in the principal case was arrested. 10 Mod. 311. Pasch. 1 Geo. 1. B. R. *Stafford v. Forser.*

13. *Executor brought assumpsit on the promise of plaintiff to his testator, and set forth in the declaration, that testator had been dead more than six years before the action brought, and had a verdict; but judgment was arrested, and resolved by all, that it could not be cured by verdict. Cited per Cur. 10 Mod. 313, 314. Pasch. 1 Geo. B. R. as the Case of Dean and Crane.* 1 Salk. 28.
S. P.

14. In *assumpsit*, the count was of a promise 16 Jan. 1706; the defendant pleaded in bar the *statute of limitations*, and that *causa actionis non accrevit infra sex annos* before the exhibiting of the bill. The plaintiff replied, that the bill was exhibited 23 June, 1713, and that the cause of action did arise within 6 years before the exhibiting the bill. Defendant demurred; but judgment was given for the plaintiff. For this being the case of a parol promise, the day in the declaration is not material. 10 Mod. 348. Hill. 3 Geo. 1. B. R. *Cole v. Hawkins.*

15. In case the plaintiff declared, and laid damages to 400 l. the defendant pleaded the *statute of limitations*, viz. *non assumpsit infra sex annos*. The plaintiff replied, that he sued out a *latitat* to take the defendant two years before the action brought, for 150 l. On demurrer it was insisted for the defendant, that these were *different actions*; for that no man would take out a *latitat* for 150 l. and declare *ad damnum* 400 l. It is true, if the plaintiff had averred it to be one and the same cause of action, it might be otherwise; and so it was ruled by the Court. 8 Mod. 109. Mich. 9 Geo. *Holloway v. Thurston.*

16. It was said and urged by counsel, arg. and agreed by the Master of the Rolls, that a defendant, insisting upon the benefit
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of the statute, *by way of answer*, shall at the hearing have the like benefit thereof, as if he had pleaded it. Trin. 1723. 2 Wms's Rep. 144. in Case of Norton v. Turvill.

[125] (T) *Equity*. Relief in what Cases against the Statute.

1. *A Trust* is not within the statute of limitations; per the Master of the Rolls. Trin. 1723. 2 Wms's Rep. 145. in Case of Norton v. Turvill.

reol: was lent by the lady of the Lord Hollis, and in the note, which was given for it, it was written that the money was to be *disposed as the Lady Hollis should direct*. An action at law for this money being barred by the statute of limitations, a bill was exhibited for relief, and the statute of limitations insisted upon. But in regard the money was looked upon as a *depositum*, and a trust thereupon to the lady, a decree was obtained for the money. 2 Vent. 345. Pasch. 26 Car. 2. Lord Hollis's Case.

The rule in this Court, that the statute of limitations does not bar a trust estate, *holds only as between cestuy que trust and trustee, not between cestuy que trust and trustee on one side, and strangers on the other*; for that would be to make the statute of no force at all, because there is hardly any estate of consequence without such trust, and so the act would never take place. Therefore where a cestuy que trust and his trustee are both out of possession for the time limited, the party in possession has a good bar against them both. Per Ld. Hardwicke, 7 July 1740. in the Case of Lewellin v. Mackworth.

2. A debt beyond the statute of limitations was ordered to be paid, because *directed to be paid by will*. Toth. 115. cites Hill. 1632. Halsted v. Little.

This Case came before the Lord Keeper, assisted by Ld. Ch. J. Brampstone, and Jones J. and as to this point it seemed to them, that the promise was barred by the statute, but they did not declare their opinion absolutely. Jo. 415. Hill. 14 Car. Row v. Ld. Newbury.

3. A note was given to *assure lands* to the value of 500*l.* per annum, upon the marriage of a woman with T. S. for her jointure, and above 20 years after this note was given, the plaintiff exhibited a bill in chancery to compel the performance of it; and upon a demurrer to the bill it was held, that the plaintiff was barred by the statute of limitations. Nelf. Abr. 1125. Limitation, pl. 11. cites W. Jones 417. Row v. Lord Newburgh.

4. The statute of limitations was pleaded, and *over-ruled*; and this Court, with the judges, were of opinion, that the plaintiff had no remedy at law, but made a decree for the plaintiff. Chan. Rep. 125. 15 Car. 1. Harrison v. Lucas.

5. Where a *real and personal estate are both subject to payment of debts*, if the personal estate is sufficient, there ought to be no further account of the real; but if the real estate is expressly charged with the payment, then so long as it remains subject to the payment thereof, it will *draw both estates to an account at any time*; because the personal estate ought, in the very nature of the thing, to go in ease of the real estate; and therefore the statute of limitations cannot interpose, or be any bar to an account thereof.

thereof. Fin. R. 458. Trin. 32 Car. 2. Davis & al. v. Dee & al.

6. If all the Courts of justice are shut up, so as no original can be filed, yet this statute will bar the action, because the statute is general, and must work upon all cases which are not exempted by the exception. 2 Salk. 420. in Case of HALL v. WYBORN. Trin. 1 W. & M. B. R. says, it was so held by Bridgman Ch. J. in one Bynion's Case. S. C. cited 10 Mod. 206. Hill. 12 Annæ. B. R. and said, that this resolution was often approved by Holt Ch. J.

7. Defendant was ordered not to insist on the statute of limitations. Per Ld. Wright 2 Vern. 503. Trin. 1705. Gilbert v. Emerton. Denied in the Case of Peers v. Belamy. — 2 Vern. 504.

And denied. Ch. R. 205. 13 Car. 2. Cradock v. Marsh. — Denied. 13 Car. 2. Ibid. 214. Hurdret v. Calladon. — If, pending a suit in chancery, the statute of limitations takes place, and the bill is dismissed, as being a matter properly determinable at common law, chancery will not suffer the statute to be pleaded in bar of the plaintiff's demand. Vern. 73. Mich. 1682. [126]

Anon. — 2 Chan. Cases. 217. Pasch. 28 Car. 2. Anon. If a suit be in chancery in debt for rent, by lease, parol, or simple contract, and the suit begins within time of limitation, and be dismissed after time of limitation, the Court will not order defendant to take no advantage of the statute. 2 Chan. Cases, 217. cites Boscawen v. Boscawen. — But if in such suit the party is stayed by act of the Court, as by injunction, &c. it is otherwise; for the act of the Court shall do no prejudice as in case of demurrers at law. 2 Chan. Cases 217. Pasch. 28 Car. 2. Anon. —

8. Per Ld. Hardwicke, there may be a case, where the circumstance of concealing a deed shall prevent the statute's barring; but then it must be a voluntary and fraudulent detaining; for to say, that merely having an old deed in one's possession shall deprive a man of the benefit of the act, is going too far, and would be a hard construction of a statute made for the quieting possessions. It must therefore be an intentional concealment. 7 July, 1740. in the Case of Lewellin v. Mackworth.

(U) Equity ; What Proceedings in Equity are within it.

1. THE statute of limitations speaks nothing of bills in equity, yet these are construed to be within it. The case of not reviving a decree, which is only to account, is within all the mischief designed to be prevented, viz. to sue a man after his vouchers may be lost, or his witnesses dead. For if the party may delay 6 years before he revives his bill, he may do so for 26, 36, or 46 years. There can be no doubt, if it be only a bill and answer, and the suit abated, the executor must bring his bill of revivor within six years, else the suit would be barred; per King C. And he said, the reason holds still as strong in the case of a decree to account, which is in nature of a judgment quod computet; where, if plaintiff had died, his executor or administrator could not formerly carry it on, as now by the statute he may; and though

though it may seem a material *objection*, that when there is a decree to account, the defendant as well as plaintiff may revive, he said, it would however be very hard for equity to force a man to revive a suit against himself, at the same time that he swears he owes nothing; and therefore directed that the plaintiff amend his bill, and defendant his answer, to bring the matter more fully before the Court. After which the defendant died, and plaintiff brought another bill against his administrator, to which the administrator pleaded the statute of limitations; and upon arguing the same in Mich. 1727, before his Lordship, he disallowed the plea, saying, that a *bill of revivor after a decree to account is in the nature of a sci. fa.* and not within or barrable by the statute of limitations, though the demand seemed to be a very stale one, and not to be countenanced. Wms's Rep. 742 to 745. Mich. 1721, 1727. Hollingshead's Case.

(W) In Criminal Matters.

1. **P**ARTY robbed shall have an *appeal of robbery* 20 years after the robbery committed, and shall not be bound to bring it within a year and a day, as in the case of an *appeal of murder*. 4 Le. 16. Trin. 26 Eliz. B. R. Doyle's Case.— 2 Show. 392. S. C. cited Arg.

[127] 2. Statute of limitations is no plea to a suit *pro violenta manu*, &c. but that is because the proceeding is *pro reformatione*, and not for damages; and so at common law it is no plea to an *indictment for trespass*; otherwise in an action. Per Holt. Ch. J. 2 Salk. 424. Obiter. *Hide v. Partridge*.

3. 7 W. 3. 3. No person shall be indicted, tried, or prosecuted for treason or misprision of treason, (whereby any corruption of blood may ensue) committed or done within England, Wales, and Berwick upon Tweed, unless the indictment be found by a grand jury, within three years after the offence done.

Provided not to extend to persons designing &c. to assassinate; nor to impeachments in parliament, nor to counterfeiting the coin, great or privy seal, sign manual, or privy signet.

As to more of Limitation in general; see *Beyond Sea, Scilin*, and other proper Titles.

Lis Pendens.

(A) What is.

1. **I**F one *sues out an original returnable 15 Martini*, but the same is not delivered to or returned by the sheriff, and as he is coming to C. B. upon a supposition that the writ was returned, he is arrested by process out of London, &c. he shall not be discharged by the privilege of C. B. For no writ or plea is depending in C. B. 9 H. 6. 54. b. pl. 40.

piece of parchment thrown into the office, which may lie there for ever, and never come to a suit. Abr. Equ. Cases 39. in Case of Moor v. Welsh Copper Company.

See Trial (C. 2) pl. 29 &c. It is no suit depending till the parties have appeared, or been served to appear, but only a

2. A suit is *determined by a recovery*. Br. Quare non admittit; pl. 1. cites 34 H. 6. 41.

3. A writ is pending presently upon the purchase thereof; for if a stranger purchase the land before the return thereof, it is *champerty*. Cro. E. 677: in Case of Arundell v. Arundell.

4. A suit cannot be said to be *begun and depending all upon the same day*. Cro. E. 858. Barnes v. Greenwell.

5. Where the original writ comes out of the chancery, and is returnable in the C. B. or B. R. there, in as much as the original comes out of another Court, the C. B. or B. R. has no record before the return of it; but where process issues out of the same Court, and is returnable in the same Court, there the suit shall be said depending before the return or serving of subpæna: 5 Rep. 47. b. Littleton's Case.

6. Where an original writ is purchased out of chancery, returnable in C. B. or B. R. in such case, after the return of the writ, it shall be said pending from the day of the teste of it; and if the tenant alien before the return, and after the *teste, this shall be said an alienation pending the writ. 5 Rep. 47. b. Littleton's Case.—48 b. Drywood's Case. S. P.

* 2 Sid. 94.

7. An action shall not be said to be depending till the bail is filed. Vent. 135. Tatlow v. Bateman.—2 Lev. 13. S. C.

8. Subpæna served; and bill filed is a lis pendens against all persons; but the service of a subpæna, without a bill's being actually filed, makes no lis pendens; but the bill being filed, the lis pendens commences from the service of the subpæna, though it be not returnable till the next term, and though the party lives never so remote. See Vern. 318. Pasch. 1685. Anon.

Cro. J. 340. Freeman & Sheen.

9. A suit commenced by *latitat* for a false return of a member

of parliament is a good commencement of a suit, by three judges; contra Holt. 12 Mod. 26. Culliford v. Blanford.

[128] 10. Where the statute of limitations is pleaded, the plaintiff may reply, that he purchased a *latitat* within the time, *ea intentione* to declare in action. 1 Sid. 53. And this shall save his being barred. Holt agreed that case, because it was *to save an old right* of action vested; but he *never* knew an instance, where suing out a *latitat* did save a limitation of an action of debt upon a penal statute; but the time of commencement ought to be reckoned from the filing the bill. Besides there was no need of suing by bill for such penalty, but it might have been by original. But notwithstanding judgment was *pro quer'* by the other three. 12 Mod. 27. cites Hall and Wymark's Case.

11. It was pleaded to an action in B. R. that there was another action for the same cause depending in C. B. *nul tiel* record was pleaded; rejoinder was that defendant had *discontinued* the action in C. B. Defendant demurred, and resp. ouster awarded. 12 Mod. 307. Marley and Blunt.

12. A bill, which is not to be brought to a hearing, (as a bill for perpetuating the testimony of witnesses to prove a will of a real estate, in which no relief is prayed) is not such a bill as can properly create a *lis pendens*, so as to affect a purchaser claiming under one of the parties, after the filing the bill: but it is such a suit, wherein the proceedings under it, when they are rightly carried on, must affect those who *claim as purchasers under one of the parties after the filing of the bill*. Per Lord Chancellor. Barn. Chan. Rep. 454. Pasch. 1741. Garth v. Crawford.

(B) The Force and Effect of it.

1. IF a purchase be made in chancery under a decree there of a *reversion expectant on an estate for life*, and then the tenant for life dies, such purchaser shall not be drawn to take his money again with interest, notwithstanding the pretence of *pendente lite*. Per Cur. See Chan. Rep. 71. to 76. Kennedy v. Vanlore.

2. The rule for binding titles *pendente lite* (which is the rule of practice at this day) was the Ld. Bacon's rule, and that rule is, that *lis pendens binds, if it be in full prosecution*. Arg. Chan. Cases 151. And Ld. Keeper said, that it is not form, but the substance of a decree, that all be bound that come in *pendente lite*. Ibid. 152. Mich. 21 Car. 2. in Case of Style v. Martin.

3. A. purchased and paid the same day that the bill was exhibited; yet lost his purchase, though he had no notice of the suit. Mich. 29 Car. 2. Chan. Cases 301. cites it as Sir Robert Austin's Case.

4. Where a man is to be affected with a *lis pendens*, there ought to be a close and *continued prosecution* with actual notice; you may affect any one by an original bill, but as to notice purely by a *lis pendens*, you shall not affect any one who is not party

party to the suit by an original bill, unless the former cause has proceeded to a decree. Per Ld. North. Hill. 1684. Vern. 286. Preston v. Tubbin.

5. If the suit be proceeded in with effect, the interest of all *persons that come in* pendente lite, though they are *no parties to the suit*, shall be bound and avoided by a decree in that cause; per Solicitor General. Vern. 287. Hill. 1684. Preston v. Tubbin.

6. A purchase after a bill filed, and subpoena served, and defendant in contempt for not answering, though without actual notice, and for a valuable consideration, will be set aside; and this is in imitation of the common law. But in case of a fair purchase without notice, the plaintiff will be held to strict proof; and there being some defect in part of the proof on the plaintiff's side, the Court refused to give him leave to amend or make any new proof after publication. But a purchase pendente lite, without any valuable consideration, and to avoid and elude a decree, ought to be highly discountenanced; even though the alienation be made for never so good consideration, per Ld. Ch. King. But his lordship said, that though this Court will oblige all to take notice of its decrees, as much as of judgments, yet there seems not the same reason as to the filing of a bill, which is often kept in the Six-Clerks desk, and by that means difficult to get notice of it; and dismissed the bill; but being only because of a slip in proof, it was to be without costs. Trin. 1728. 2 Wms's Rep. 482. Sorrel v. Carpenter.

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7. The pendency of a bill in chancery relating to an infant's estate is notice to all the world of the infant's being a ward of this Court, so as to make persons concerned in the marriage of such ward without leave of the Court guilty of a contempt, though they had not any actual knowledge of her being such a ward. Barn. Chan. Rep. 407. April 6, 1741. Moor v. Moor.

(C) Pleadings.

1. Acceptance of a part of a debt on bond pendente billa goes in bar, and not in abatement; for the plaintiff for this part is barred for ever, and this receipt is a lawful act; but an entry pending the writ shall abate it; for it may be unlawful. Cro. E. 342. Mich. 36 and 37. Eliz. B. R. May v. Middleton.

2. A. pleaded that he was a purchaser for a valuable consideration without notice of any incumbrance; but it appearing that the purchase was made pendente lite, the plea was overruled, and a decree to reconvey and deliver the writings. Fin. R. 321. Mich. 29 Car. 2. Fleming v. Page and Blaker.

3. Legatee infant sues in a court ecclesiastical, and pending that suit, sues in chancery; the former suit depending being pleaded, the plea was disallowed; for there is no such security

for the infant's advantage, as here, and possibly not for interest if placed out, and for bringing in account here, &c. Hill. 33 & 34 Car. 2. 2 Chan. Cases 85. Howell v. Waldron.

* See Actions (E).d

* Lodger.

(A) Lodger or Guest in private Houses. *Who is considered as such; and his Power.*

1. **L**odger has a *possessory right* against all strangers, and even the landlord himself; and if he comes and takes goods out of the room, an action of trespass lies; the key of the room being given is more than a bare use, such as a *guest* has. It is an *interest* not determinable, but at a week's end. Arg. Show 51.

2. In an *account* no allowance shall be for *diet*, where the plaintiff came as a guest at the defendant's *invitation*. Mich. 1681. Vern. 19. Arundel v. Roll.

3. The defendant had a *bond* from the plaintiff for 50l. in 1684, and in 1685, the defendant lodged and dieted with the plaintiff, and in 1699, the defendant brought an *action* at law on the bond, against the plaintiff who brought this bill to have a discount for the diet and lodging, and though there was no agreement for that purpose, and such length of time passed, yet the Master of the Rolls decreed it to an account, and said, that so it should be, if the defendant had been a bankrupt, and the plaintiff should have had a discount against the commissioners or assignees, and that a discount was natural justice in all cases. Hill. 1699. Abr. Equ. Cases 8. Arnold v. Richardson.

(B) Favour'd or Punished.

1. **L**andlord in private-houses is not answerable for loss of lodger's goods. 5 Mod. 428. Arg.

2. 3 & 4 W. & M. cap. 9. enacts, That if any person or persons shall take away with an intent to steal, imbezil or purloin any chattel, bedding, or furniture, which by contract or agreement be

Before this act it was not felony for a lodger

or they are to use, or shall be let to him or them to use in or with such lodgings; such taking, imbezelling, or purloining, shall be to all intents and purposes taken, reputed, and adjudged to be larceny and felony, and the offender shall suffer as in case of felony.

to take away the land-lord's goods, though with design to steal them.

5 Mod. 428. Parkhurst v. Foster.——1 Salk. 388. S. P. & C.——Show. 50. the King v. Meers. S. P.——Kelyng 24. Raven's Case.——Ibid. 81. S. P. But see there that Keling after was of another opinion. Ibid.——It seems not to have been clearly settled before this statute, whether a lodger, who stole the furniture of his lodgings, were indictable as a felon, inasmuch as he had a kind of special property in the goods, and was to pay the greater rent in consideration of them; but if it had appeared clearly, from the whole circumstances of the case, that the first intention of the party in coming to the house was not to have the convenience of lodging in it, but only under the colour thereof to have the better opportunity of rifling it, and to evade the justice of the law, by endeavouring to keep out of the letter of it by gaining a possession of the goods with the consent of the owner, Serjeant Hawkins says, he cannot see any good reason, why such a person should not be esteemed as much a felon as a mere stranger, inasmuch as his whole design was to defraud the law, and the consent of the owner was grounded on a supposition of his coming as a lodger, and could never have been gained if the truth had appeared, which the party shall get no advantage by falsifying: and it brings a contempt upon the justice of the nation to suffer its laws to be evaded by such little contrivances. However this question is now settled by this act. 1 Hawk. Pl. C. 91. chap. 33. s. 10.

(A) Longitude.

1. 12 Anna Sess. 2. *AP*points certain commissioners for examining and judging of all proposals for the discovering the longitude at sea.

S. 3. Gives to the first discoverer of any method his executors, administrators, and assigns, 10,000*l.* if it determines the longitude to one degree of a great circle, or 60 geographical miles; 15,000*l.* if it determines the same to two thirds of that distance; and 20,000*l.* if it determines the same to one half of the distances, to be paid as therein directed.

And by s. 5. If any such proposal shall not be found of so great use as aforementioned, yet if the same, in the judgment of the commissioners, be found of considerable use to the publick, the authors shall have such less reward as the commissioners shall think reasonable, to be paid by the treasurer of the navy.

Lunatick, Non Compos, and Ideot.

(A) Custody. Who shall have it, and how.

By the words of the statute the king shall have the custody of them during their lives. Dalt.

1. 17 E. 2. 9. **E**Naçts, That the king shall have the custody of natural fools, taking the profits thereof without wast, and finding them necessaries, of whose fee soever the lands be holden, and after the death of such ideots shall render them to the right heir, so that the lands shall not be sold, nor the heir disinherited. Prerog. Reg. Just. 95. cites Stamf. 34, 35. — But he shall find necessaries for maintenance of the ideot, his wife, children and family. Ibid. cites Stamf. 35. 37.

2. 17 E. 2. 10. Prerog. Reg. enacts, That the king shall provide that the lands of lunaticks be safely kept without wast, and they and their families (if they have any) shall be maintained with the profits thereof; and that the residue be kept for their use, and be delivered unto them, when they come to right mind, so that the lands shall not be aliened, neither shall the king have any profits thereof to his own use; but if they die in such estate, the residue shall be distributed for their souls by the advice of the ordinary.

3. Dean of Pauls was lunatick, the archbishop of Canterbury shall have the custody of him. D. 302. b. marg. pl. 46. cites Temps H. 8. Pace's Case.

D. 25. b. pl. 164. S. C. and Fitzherbert thought the lunatick might have account when he comes to be sane memorie, sed fuit negatum. — Ideo quære inde — Bendl. 17. pl. 23. S. C. And. 23.

4. It was found by office that F. was a lunatick, for which the king seised his lands and his body, and committed the custody thereof to one H. *quamdiu* he should be a lunatick, to take the profits to his own use, rendering rent, &c. And now in trespass H. prayed aid of the king, et non allocatur, because the patent is void; for the king cannot grant the lands of a lunatick to another to take the profits to his own use; because himself is not intitled to them, otherwise than to sustain the person of the lunatick, his issue, wife and family, and to give the surplufage to the lunatick when he recovers his memory. But otherwise it is of an ideot; for the king there shall have the profits to his own use, making allowance to the ideot for his keeping. Mo. 4. Hill. 28 H. 8. Rot. 420. Frances v. Holmes.

pl. 47. S. C. — S. C. cited 4 Rep. 127. b. in BEVERLEY'S Case; and that if one be appointed by the king, or if one of his own head takes upon him to meddle with the lunatick's affairs, he is only as a bailly to the lunatick, and shall be accountable as such to the lunatick or non compos mentis, his executors or administrators, and cannot cut trees but for necessary house-bote, plow-bote, and cart-bote, and to repair ancient pales, and what a bailly may do, he may do, and no more. — S. P. and that if the lord of a copyhold-manor commits the custody of a lunatick copyholder, such committee cannot bring trespass in his own name, because he is only as a servant. — And it was clearly agreed in the Court of wards, that an ideot copyholder ought not to be ordered in that Court for his copy-

copyhold, but in the Court of the lord of the manor. D. 302. b. pl. 46. Trin. 13 Eliz. Anon.— And it is there said in the marg. that in the time of King H. 8. one PACE DEAN OF PAULS. was in custody of the archbishop of Canterbury, being lunatick, and that it was a question in the Court of wards, who should have the custody, and upon precedents shewn, the archbishop had him in custody, and not the king; and says that this Case was cited by Mr. Eyres, in a reading at Lincoln's Inn.

5. An ideot, that is a *copyholder*, shall not be ordered in this Court as to his copyhold, but in the Court of the lord of the manor. D. 302. b. pl. 46. Trin. 13 Eliz. in the Court of wards.—And the ward of the land and the body was committed *by the steward*. Ibid.

6. Lord of a manor hath not power to dispose of the *copyhold* [132] of a lunatick, without special custom; per Cur. Hut. 17.

The * king shall not have the custody of copyhold lands of an ideot. Hard. 434. cites 4 Rep. 126. Beverley's Case. — Dalt. Just. 95. cites 8 Rep. 170.

7. *The appointing* this or that person a committee is a matter of prudence, and not of right; and a *sister of the half-blood* was denied to be made committee; because, though she will not be intitled to inherit the *real estate* on the lunatick's death, yet she will be intitled to the administration of the personal estate, and so concerned to outlive her; per Finch C. Mich. 29 Car. 2. 2. Chan. Cases 239. Lady Mary Cope's Case.

But it being insisted, that there is not the same objection against the next of kin of the lunatick on account of the

personal estate, as there is against the heir with regard to the real estate, because the personal estate may increase, and probably will, by good management during the lunatick's life, so that the longer the lunatick lives, the better it will be for the next of kin, and consequently for their * interest to prolong the lunatick's life. Ld. C. King granted the commitment accordingly of the personal estate, and all parties agreed that the commitment of the real estate should go to J. S. a neighbouring gentleman of a fair character, who was likely to manage it to the best advantage. 2 Wms's Rep. 544. Trin. 1729. Neale's Case.

* S. P. by Ld Ch. King. 2 Wms's Rep. (638.) Mich. 1731. Ex parte Ludlow.

8. *Custody* of a lunatick shall never be granted to one that will make gain of it. Mich, 29 Car. 2. 2 Chan. Cases 239. Lady Mary Cope's Case.—Grant of the custody of a lunatick *absque compoto* is void. Hob. 153. cites D. 26.—And 23. Frances's Case.—Mo. 4. S. C.

9. If the *custody* of an ideot may by patent be granted to a man his *executors*, administrators and assigns; per Lord Ch. Nottingham, it seems not. Vern. 9. Mich. 33 Car. 2. Prodgers v. Fraiser.

2 Chan. Cases 70. S. C.—North K. directed the validity of

the patent to be tried at law. Vern. 127. Hill. 1682. S. C.—It passes an interest coupled with a trust. 3 Mod. 44. Prodgers v. Fraiser.

10. An Irish peeress was committed to the Fleet by Ld C. Parker for not producing the lunatick according to an order of Court, and being instrumental in removing him from place to place, to evade his being produced. But his lordship said, that if upon the producing him he should be found a lunatick, his wife must have the commitment of his person, and also an allowance suitable to his estate and quality; and that the estate must all be accounted

counted for; and *his personal estate, upon his death without children, will go one moiety thereof to her.* Note, afterwards a jury found him a lunatick, and the custody of his person was granted to his wife, she being discharged from her commitment. Wms's Rep. 701, 702. Trin. 1721. Ld Wenman's Case.

11. Where *two persons equally kin to a feme lunatick, the one a man, and the other a woman,* and neither of them being heir at law to the lunatick, contend for the custody, and the objections against the one are no stronger than against the other; Ld. Ch. King granted the custody to the woman, as being of the same sex, and so probably better knowing how to take care of the lunatick, and in this respect be more tender of her; and though the equality of kindred seemed to intitle both, yet having found by experience, that granting it to two had proved inconvenient by occasioning law-suits, and putting the estate to great expence, he granted it to the one only. 2 Wms's Rep. (635.) Mich. 1731. Ex parte Ludlow.

12. Though a *father devises the custody* of a lunatick, who is *beyond the age of 21,* the will is void, and the devisee shall not have it. 2 Wms's Rep. (638.) Mich. 1731. Ex parte Ludlow.

[133] 13. The custody of a lunatick's estate was *granted to the husband and wife, the wife being next of kin to the lunatick.* She died. The Lord Chancellor held, that the *husband's right to the custody of the lunatick's estate is determined,* it being a joint grant, and a meer authority without any interest; and said, it had been so determined in Ld King's time. Sel. Chan. Cases, in Ld Talbot's time. 143. Mich. 1735. Lyne's Case.

(B) Power of the Committee. And Allowances.

Vern. 9. 5.
P. Mich.
33 Car. 2.

1. **T**HE king shall have to his own use (and therefore may lease rendring rent) all the possessions of a fool natural (not of any other idiot) during his ideocy; but not that to which he has *title of entry or action;* and therefore upon office found, that the ancestor of the idiot died seised of the estate tail, it is sufficient to traverse the dying seised; for this only intitles the king. Finch. 43.

2. The king cannot grant the *profits of the lands of the lunatick* to another to his own use, but of an idiot he may. Mo. 4. Hill. 28 H. 8. Frances's Case.—And. 23. S. S.—8 Rep. 170. b. S. P. Tourson's Case.—Finch. 43.

3. Copyholder for life becomes lunatick, and *A. his cousin sows his land;* afterwards *the lord grants the custody to B.* and A. takes the corn to the use of the lunatick, and B. brought trover and conversion in his own name; but per Cur. he should have brought it in the lunatick's name and as this case stood, neither the lord nor the committee have any thing to do to meddle with the corn. Noy. 27. Hill. 13 Jac. C. B. Cox v. Dawson.

4. The

4. The *allowance* (according to the quality and estate of the lunatick) must be liberal and honourable. 2 Chan. Cases 240. Mich. 29 Car. 2. Lady Mary Cope's Case.

Chancery is to take care of the benefit and comfort of the

lunatick where no creditor complains, and not to heap up wealth for his executors or next of kin; per Lord Macclesfield. 2 Wms's Rep. 262. Mich. 1724. Justice Dormer's Case.

5. No *committee* of a lunatick should get 6d. by him save for food, clothing, and physick; he should *account daily* before a master, and the overplus be placed out on security where the administrator of the lunatick might know how to find it; per Finch Chanc. 2 Show 172. 33 Car. 2. Progers v. Fraiser.

4 Rep. 127. b. Beverley's Case. The next of kin may be called to be present at the account

to be yearly made before the master. 2 Chan. Cases 241. Mich. 29 Car. 2. Lady Mary Cope's Case.

6. Committee of a lunatick *cannot make leases*, nor any ways *incumber* the lunatick's estate without special order of this Court, where the profits are not sufficient to maintain the lunatick; nor shall any *allowance for improvements*, or buildings on the lunatick's estate be made him. Vern. 262. Mich. 1684. Foster v. Merchant.

Ley. 47. Blewit's Case.

7. Referred to a master to examine and report what maintenance was reasonable to be allowed for lunatick's son, ut sup.

8. 4 Geo. 2. 10. *Ideots or their committees, how enabled to convey trust estates.*

See this act more at large at (K).

(B. 2) What Interest the King has in his Lands, &c.

1. IT is sufficient if the king be answered of the possession, because though the ideot had *title of action* to the land by way of entry, or by action, yet if he had not possession the king shall not have custody of the land, and so see that of a chose in action by ideot, and not in possession, the king shall not have it. Br. Chose in Action, pl. 12. cites 1 H. 7. 24. at the end.

* Dalt. Just. 95. cites Fin. Law. 95.

2. The king shall be answered of the issues of the land of an ideot but from the time of his title found by office. Dalt. Just. 95. cites 8 Rep. 170. and Stamf. 84. and 38.

3. The king shall have the lands to his own use and may let the same to farm rendering rent. Dalt. Just. 95. cites Finch. 95.

(C) Actions or Suits in Right of Lunatick. In whose Name, and where he must be Party.

See (B) Cog v. Dawson.

1. A Lunatick [was ordered] to answer by his friend. Toth. 227. cites Mich. 15 Car. Thomas v. Howorth.

2. The

2. The custody of a copyholder, that was a lunatick, was committed to J. S. and a *trespass* was done upon his land; the Court was of opinion that the *action* should be brought *in the lunatick's name*. Poph. 141. Anon.—Hutt. 16. S. P. and seems to be S. C.

It was over-ruled as to the lunatick's being made a party

3. Where committees of a lunatick sue for any thing in the right of the lunatick, in such case the *committee* as well as the lunatick is made party. Chan. Cases 19. Hill. 14 & 15 Car. 2.

Chan. Cases 112. Mich. 20 Car. 2. Palmer v. Parkhurst.—Where a suit is on the lunatick's behalf, he must be made a party. Chan. Cases 153. Mich. 21 Car. 2. Attorney General v. Woolrich.—Unless where it tends to *stultify himself* Chan. Cases 153. cites Smith's Case.—Actions ought to be in the lunatick's name. Noy. 27. Cox v. Dawson.—A lunatick shall have a *quare impedit* in his own name. Hutt. 16. cites it to have been so ruled.—Noy. 27. cites it to have been so adjudged.—Committee may bring action of *debt for rent* due on a lease made by the lunatick before he was lunatick. D. 302. b. marg. pl. 45. cites 33 Eliz. B. R. Sowper v. Goodbody.

(C. 2) Actions, Suits, &c. by or against a Lunatick.

Br. Idiot, pl. 1. cites 33 H. 6. 18.—Br. Garden, pl. 2. cites 33 H. 6. 18.

1. **A**N idiot shall *not* be received to *plead by guardian, nor prochein amy*, but it shall be always *in proper person* in every action brought against him, and he that will plead the best plea for him shall be admitted. F. N. B. 27. (G) cites P. 33 H. 6. 20. and 12 E. 2.

* But in a like case where defendant demurred because the lunatick was not made a party the demurrer was ruled good, the Ld. Keeper declaring that it was as necessary to make the lunatick a party as an infant where a suit was in his behalf; but in case of an idiot it must be otherwise;

2. *A. in 1664. was found a lunatick, and had lucid intervals, and that he was lunatick in 1647. and that during his lunacy he was prevailed upon to assign a debt, which he did under colour of satisfaction, and which was suggested not to be valuable; upon a bill brought in behalf of the lunatick the defendant said, that the said debt was assigned in payment of purchase money for a manor bought of defendant by the lunatick in 1656, at which time A. was not lunatick but did usually buy and sell &c. Upon hearing the cause by Tirrel J. when all the matter appeared as above, he ordered defendant to account and satisfy the debt with damages, but directed nothing as to the defendant's having the manor again, or any account of the meane profits. It was insisted that the lunatick in case of a bill brought for his benefit, as in this case, ought to be * made a party; but that opinion was over-ruled by the judges, and the lord keeper upon a re-hearing. But his lordship stayed the passing the decree and gave liberty to the defendant to traverse the inquisition.* Chan. Cases 112. Mich. 20 Car. 2. Attorney General on behalf of Smith v. Parkhurst & al.

[135] but a lunatick may recover his understanding, and then he is to have his estate in his own disposal. Chan. Cases 153. Mich. 21 Car. 2. Attorney General on behalf of Woolrich v. Woolrich.—But the book notes the difference between the two cases, viz. that Smith's Case was to be relieved against an act done by the lunatick himself in assigning a debt he being a lunatick at the time; so that his being a party had been to stultify himself, which the law does not admit; and quere how it can be done by information on his behalf? But in BEVERLEY'S Case.

4 Rep. the king has the custody of the person, lands, and goods of the ideot, so as to provide for him and to prevent alienation, and therefore by *sci. fa.* may avoid a *feoffment* and other disposition made by the ideot. But the book says that that is no breach of the rule that a man cannot be admitted to *stultify himself*; because the ideot is not party to the record in a *sci. fa.* and that in that case it is the same thing, and the writ the same as to the alienation of non compos, or a lunatick, or ideot, and the king shall protect those that cannot protect themselves; and the alienation of a non compos as well as of an ideot, being found by office shall be avoided, and that he supposes it was upon that ground those bills were founded; for the Court declared those bills proper to be brought by the Attorney General. And that in Woolrich's Case the bill was to be relieved upon a marriage agreement for the lunatick's benefit before his lunacy, so that his being a party to the bill did not tend to stultify himself and might be the reason why he should be a party to it; and the other bill tending to stultify himself might be a reason why he should not be a party to it. Chan. Cases 153, 154.

3. If a suit be against an ideot after inquisition, the ideot cannot plead it, but the king shall send a *superfedeas* to the judges suggesting the inquisition. Arg. Parliament Cases 153, in Case of Leach v. Thompson.

4. An ideot cannot bring any appeal whatsoever. 2 Hawk Pl. C. 162. cap. 23. f. 32.

5. An ideot or non compos at the time cannot be an approver. Because no such persons ought to be admitted to take the oath before the coroner without which there can be no improvement. 2 Hawk. Pl. C. 205. cap. 24. f. 5.

(C. 3) Ideot bound by what Acts.

1. FINE was levied by ideot a nativitate, who dies; the use shall be to the conusee. 2 And. 193. Lewis v. Winne,—though after found so by office. 12 Rep. 123. Mich. 12 Jac. Mansfield's Case.

And forasmuch as he was not disabled to levy the fine, he shall not be

disabled to limit the uses which are but the accessory, the fine being the principal. 12 Rep. 123. Mansfield's Case.

2. Infant runs parallel with an ideot in all cases but this, viz. that an ideot is not admitted to disable or stultify himself; per Holt. 3 Salk. 301. Hill. 9 W. 3. B. R. Thompson v. Leach.

3. There is a difference between a *feoffment* and *livery made propriis manibus* of an ideot, and the bare execution of a deed by sealing and delivery thereof, as in cases of surrenders, grants, releases &c. which have their strength only by executing them, and in which the formality of livery and seisin is not so much regarded in the law, and therefore the feoffment is not merely void but voidable; but surrenders, grants, &c. by an ideot are void ab initio. Carth. 435. Hill. 9 W. 3. B. R. Thompson v. Leach.

4. Before office found the king cannot avoid the alienation of an ideot, and after office the practice is to sue a *sci. fa.* to him in possession, or the alienee. Arg. Parl. Cases 152. in Case of Leach v. Thompson.—Fitzh. tit. Scire facias, pl. 2. 106.

5. Even

The king
shall have
the profits

but only from the time of the office, and no precedent can be found, that the king was answered of the mesne profits before the office found, but only after the office, and so the quære in Standf. Prærog. Reg. fol. 34. b. is well resolved. 8 Rep. 170. b. Tournson's Case.

5. Even after an *office* the king cannot have the *profits* from the time of the *alienation*. Arg. Parl. Cases 152. Ibid.

[136] (D) *Acts or Grants, &c. of Lunatick, confirmed or avoided.*

1. **FEOFFMENT** is made to A. and letter of attorney to B. who is then *sane memoria*, to make *livery*, which afterwards is made by B. *being then non compos*; yet it is a good livery; because it has *relation* to the authority before, Cro. E. 447. Mich. 37 & 38 Eliz. C. B. in Case of Jennings v. Bragg.

2. If a lunatick or non compos *levy a fine* of lands, the 5 years begin at his recovering his senses, and he must bring his action within 5 years after, and in pleading he shall shew, that at the time of the fine he was non compos, and all the special matter; but if he die without recovering his senses, *his heir* shall have his action or make his *entry* when he will; for he is *excepted out of the act*, and is bound to no time. So of *being over sea*. 4 Rep. 125. b. Pasch. 1 Jac. B. R. Beverley's Case.

3. *After 20 years* and 2 purchases chancery thinks it not proper to *examine* a non compos mentis, and dismissed the bill. Chan. Rep. 40. 5 Car. 1. Winchcomb v. Hall.

4. The defendant pleads a *fine levied* by a lunatick; over-ruled in Trin. 15 Car. and an order too for a commission to examine whether a lunatick or not. Toth. 167. Sacheverel v. Brimington.

5. *Voluntary conveyance* to defendant, who was cousin german equally with the plaintiff, by one that was not lunatick, but only a person of a *weak understanding*, who could read, and taught a child to read, was set aside, by Finch C. 2 Chan. Cases 103. Pasch. 34 Car. 2. White v. Small.

32 Mod.

174. S. C.
and P.

6. If he *grants a rent*, and grantee distrains for the arrears, he may bring trespass, per Cur. 3 Mod. 310. Thompson v. Leach.

S. C. and
P. per Cur.
3 Mod. 311.
—* S. P.

It being
done upon
the land,
and in view
of the coun-
try, and
the feoffee
might have
afterwards a

7. *Letter of attorney* or *bond* by non compos is void; it is true the books say generally, that his deeds or bonds are not void; but that must be understood as that the obligor cannot plead *non est factum*; because it appears to be a deed fairly executed, but it is of no force, because of this latent defect or incapacity, which the law requires should be pleaded and put in issue specially; and so are *all his acts in pais*, except his *feoffments* and *livery and seisin*, and those are only voidable. The reason is, because of the respect the law gives to a feoffment, on the account of its solemnity in the transmutation of a freehold. And the writ *de non*

non

non compos mentis, which says *demist*, must be understood of a feoffment or a fine. Those being the ancient, and only conveyance at that time; per Holt. 3 Salk. 301. Hill. 9 W. 3. B. R. in Case of Thompson v. Leach.

confirmation of his title by way of release with warranty. — S. C. and P.

Comb. 469. Thompson v. Leach. — 12 Mod. 173.

8. His deeds are * void, *because* the law has appointed no act to be done for the avoiding them; per Holt. 3 Salk. 301. Thompson v. Leach. * 3 Mod. 310. S. C.

9. The heir of a lunatick need not have a *sci. fa.* to avoid the feoffment of his ancestor made during his lunacy, but may enter without it; per Holt Ch. J. and judgment accordingly. Comb. 468. Hill. 10 W. 3. B. R. Thompson v. Leach.

10. The king, during the life of the non compos, cannot avoid the feoffment without a *sci. fa.* Comb. 468. Thompson v. Leach.

11. A bill will not lie in Chanc. to perpetuate the testimony of witnesses to a lunatick's will in his life time made before his lunacy. Vern. R. 105. Mich. 1682. Sackvill v. Ayleworth.

12. A settlement by one that was in fact a lunatick, though in other respects it be reasonable and for the convenience of the family, yet it ought to be set aside in equity; per Wright K. [137] Vern. R. 412. Hill. 1700. Clerk by Committee v. Clerk.

13. A purchase by deeds, fines and recoveries at a great undervalue from one that was a lunatick, (but found so afterwards) and a stated account was set aside, though defendants insisted on a trial at law; but decreed, that defendant be allowed what he proved he had paid for the use and benefit of the lunatick; per Harcourt Ch. 2 Vern. R. 678. Hill. 1711. Addison per Committee v. Dawson, Mascall & al.

14. A bill was brought by a lunatick and his committee, to set aside a settlement, which had been obtained from him by the defendant before the issuing out of the commission of lunacy, but subsequent to the time wherein by the commission he was found to have been a lunatick, and the bill charged several acts of insanity and distraction, previous to the making of the settlement, and the issuing out of the commission; and charged likewise, that the commission of lunacy was still in force. To this bill the defendants demurred, for that it was against a known maxim of law, that any person should be admitted to *stultify himself*; because, during the continuance of the lunacy, he cannot be supposed to know what he did: but my Ld. Chancellor over-ruled the demurrer, and said, that rule was to be understood of acts by the lunatick to the prejudice of others, that he should not be admitted to excuse himself on pretence of lunacy; but not as to acts done by him to the prejudice of himself; besides, here the committee is likewise plaintiff, and the several charges of lunacy are by him in behalf of the lunatick; and it has been always held, that the defendant must answer in that case; and so he was

was ordered to do here, though the settlement was not unreasonable in itself, being to limit the estate in question to the defendants, the uncles, in case of failure of issue male of the lunatick, with power for the lunatick to charge the same with considerable portions for his three daughters, and a power of revocation. Abr. Equ. Cases 279. Mich. 1729. Ridler v. Ridler.

(D. 2) A&C. Avoided. *How, and by whom.*

1. **I**N trespass the question was, if a *man make a feoffment, being non compos mentis*, whether he may enter or not, and if he cannot enter, whether his heir may enter, and per Laicon, Ashton and Prisot, he who made the feoffment cannot enter; for he cannot disable himself; nevertheless, per Prisot, the reason is, because he cannot know in his sanity what he did when he was non compos mentis; and the opinion of all the Court was, that a man *shall not defeat* a feoffment made by himself when he was non compos mentis, though he returns to his senses, and this *neither by action nor by entry; but per Cur. his heir may enter.* Br. Entre Cong. pl. 47. cites 39 H. 6. 42.

*Arg. Godb. 302. cites 4 Rep. 166. b. and saith, that it is in respect of the statute of prerogative regis,

and not of any right remaining in the non compos, who made the feoffment.——† S. P. as to the father, but the heir after his death may avoid the feoffment of his ancestor; for *de ipso descendit jus*, though the father had not a right in his life time. Arg. Godb. 302. Pasch. 21 Jac. in the Exchequer Chamber, in Case of Sheffield v. Ratcliff.

2. A non compos *cannot stultify himself*; but the * king (during his custody) and his † heir (after his decease) for the inheritance, and executors for a testamentary estate shall *avoid* respective acts in the country of non compos mentis, idiot or lunatick. Jenk. 40. pl. 77.

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(D. 3) Other Matters.

1. **I**N the case of an idiot the Court, *ex assensu partium*, disposed of and *settled his land* in such manner as he should not sell it, but to his younger brother. 2 Bulf. 320. Hill. 12 Jac. Requish v. Requish.

2. An idiot is *maintainable by the parish* where the father is settled, not where born. 2 Salk. 427. Mich. 11 W. 3. B. R. Hard's Case.

3. Fools and madmen are *tacitly excepted out of all laws* whatsoever. Per Holt Ch. J. Carth. 483. Pasch. 11 W. 3. B. R. London City v. Vanacker.

(E) *How*

(E) *How the Lunacy shall be tried, and what is a good Return.*

1. **A.** Suspected to be lunatick heretofore, now becomes in the same condition upon *his arraignment* by covin, or otherwise in reality. Resolved, that an inquest be impanelled to inquire if it was of malice or not. Savil. 50. Somervill's Case. Resolved, if he shall be *found lunatick by covin*, there being a dissimulation, he shall be *tried* upon the principal matter, and not condemned to *pain fort & dure*, as in cases of felony. But if he will not answer directly, being of sound memory, he shall be condemned upon a *nihil dicit*, and notwithstanding he shall have judgment which pertains to high treason, and not be put to pain forte & dure. Savil. 56. Somerville's Case.

And if he be found lunatick, his trial shall be deferred till he be of sound memory. But it was fully and absolutely agreed, that if he had pleaded the general issue not be taken

non culp. that if after he shall come upon evidence, and not speak directly, yet he shall be found lunatick, in as much as he has answered directly. Savil. 57. S. C.

2. A motion was that a lunatick, being by his confinement become of *sound mind*, might be *inspected*, and *make a settlement of his estate*. But North K. refused to make any order in it, but directed, that if he made any settlement of his estate, it should be done before the justices of the C. B. by *fine*, that so they might examine and inspect him. And that, as he was now found a lunatick on record, they should reply to it, that he was now restored to his understanding, that so *issue might be taken upon it, and tried in C. B.* Vern. R. 155. Pasch. 1683. Anon.

3. A special return was made to a commission of lunacy, which was filed; but Ld. Chancellor said, he *must be found either mad or not mad*; and if the return had not been filed, it had been no return; but since it is *filed, it must be quashed*, and an *alias commission go*. Sel. Ch. Cases in Ld. King's time. 47. Trin. 11 Geo. 1. Freak's Case.

(E. 2) *Office found. Of the finding an Idiot, and who shall be said an Idiot, &c.*

1. **A** Writ may be awarded to the *escheator, or to the sheriff of the county where such idiot resides, both to examine him, and also to inquire by a jury &c. of such idiot, and of his lands &c.* Dalt. Just. 94. cites Fitz. 232, 233. Stamf. fol. 34.—Regist. 226. 267.

2. But there can be *no seifure of the lands &c. without an office first found*. Ibid. cites Stamf. 55.

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Dalt. Just.
94. cites

3 Rep. 170. and Stamf. 34. For by the office it appears of record that the king has a right to seize the land.

3. A

3. A person, who was presented for an ideot in the time of Edward 6th. *could write letters and acquittances* and such like; and therefore was adjudged an *untbrift*; but no ideot. Br. Ideot, pl. 4. cites Brent's Case.

4. Though a man be found an ideot, yet he ought to be *examined by the council*, or otherwise he shall not be bound by the inquisition; per Dyer. Dal. 95. pl. 19. 15 Eliz. in Brent's Case.

Though it be found by inquisition that J. N. is an ideot, yet this is traversable in such manner, that he may come into the chancery, and pray that he may be examined, and the trial shall be upon examination; and if he be found an ideot upon the examination, or no ideot, it is peremptory, as held there, and they will examine him if he can count to 20 d. or if he knows who was his father, or mother, or his own age, or the days of the week, &c. And if he can understand the letters, and read by instruction of others, then it seems that he is not an ideot. Br. Ideot, pl. 4. cites F. N. B. 233. (B).

5. When a man is found ideot a nativitate by office found, he that is so found (falsely as is supposed) may *come in person into the chancery* before the chancellor, and pray that before him and such justices and sages of the law as he shall call to him (and are called *the council of the king*) he may be *examined* if he be an ideot or no, or his friends may sue a writ out of the chancery returnable there to bring him into the chancery *ibid. coram nobis & concilio nostro examinandi*, and if it be found on such examination that he is no ideot, the office thereof found, and all the examination which had been made by force of the writ, or commission of the king, is utterly void; without any travers or monstrans of right, or other suit. 9 Rep. 31. Mich. 33 & 34 Eliz. in Case of the Abbot of Strata Marcella.

6. Inquisition of ideocy taken and *melius inquirendum* upon it; see Ley. 25. Pasch. 8 Jac. Darwin's Case.

Br. Eschete
4

7. A man *deaf and dumb* from his nativity is non compos; secus if by *accident*; but one *deaf, dumb and blind* by accident is non compos. D. 56. 13. marg. cites a reading by Wakering Reader in Lincoln's-Inn 1626.

(F) Forfeitures by Lunaticks.

A. Seised of an estate of inheritance, part whereof was held of the late queen by knights service in capite, died seised thereof, leaving B. his son and heir of full age a lunatick; all which was found by office, and the government of the said B. his manors, lands &c. were granted by the said queen to J. S. by indenture, who with the rents issues and profits thereof maintained the said B. his wife, children, house and family, according to the covenants of the said indenture; and the question was, whether the king ought to have any mean rates, as the case standeth? It was resolved by the Ch. Justices and Ch. B. Mountague, Hobart, and Tanfield, that the king ought not to have any mean rates of the lands of the said B. for want of suing livery by the said B. For that the said B. at the time of the death of A. his father, was, and yet remains a lunatick, & *mentis suæ non compos*, and thereby

thereby disabled to tender, or sue a livery; whereupon a decree was had accordingly. Ley. 56, 57. Pasch. 15 Jac. Metcalf v. Barrington.

(G) Punishable. In what Cases.

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1. **ONE** non compos mentis cannot do *felony*, but may be *attaint of treason*, and if he makes a feoffment in fee, and does treason, is this not given to the king; but if he be * disfeised, the king shall have the land. Arg. 2 Roll. R. 324. cites 4 Rep. 124. Beverly's Case. The King shall avoid such feoffment; per. Coventry. Arg. 2 Roll. R. 337.—
Godb. 316. Arg. in Sheffield and Radcliff's Case. S. P.—* Because the party himself had a right of entry, which is given to the King. Arg. Godb. 316.

2. If a lunatick *hurts a man*, he shall be answerable in *trespass*, though, if he * kills a man, it is not felony. Hob. 134. Pasch. 14 Jac. in Case of Weaver v. Ward. * Pl. C. 260. 4 Rep. 124. in Beverly's Case.

3. If an infant or lunatick *commits a trespass*, they shall answer it in damages. Arg. 12 Mod. 332. Mich. 11 W. 3. in Case of Mason v. Keeling.

(H) Offences by others in respect of the Lunatick, &c. punished. How.

1. **IDEOT** *feme* has issue by her baron, and office is found; the baron shall not be tenant by the *curtesy*; because his title is over-reached by the office. Arg. 2 Roll. R. 322.

2. Forcibly taking away a lunatick under commitment, and *marrying her*, is a contempt for which chancery will commit the person; but if the marriage is afterwards held good in the Spiritual Court (as it may be by being *consummated in one of her lucid intervals*) and upon inspection it appears that she is restored to her understanding, the husband shall be discharged, and the commission of lunacy vacated. Abr. Equ. Cases 278. Trin. 1702. Asher's Case. G. Equ. R. 89. Trin. 1 Geo. 1. S. C. — Ch. Prec. 412. Mich. 1715. S. C. — The marriage, tho' good, is no *superfedeas*.

to the commitment of the lunatick; per Lord Wright. Ch. Prec. 203. Trin. 1702. Mrs. Ash's Case. — And said it was so held in Fane's Case.

3. In case of a marriage with a *feme lunatick*, chancery ordered all deeds and *securities relating to her fortune*, and all her *jewels to be lodged with one of the masters*, in order to secure some provision for her, if she should survive her husband, and also for children, if any. Ch. Prec. 412. Trin. 1 Geo. 1. Packer v. Windham.

S. C. cited
2 Wms's
Rep. 111.
in Case of
Eyer v. the
Countess of Shaftsbury.

4. *And* for this contempt Mr. Packer the husband, and others concerned in procuring the marriage were committed to the Fleet. Ibid.

5. An information was against one for being the contriver of a marriage of an ideot that had lands of inheritance. 9 Mod. 98. Mich. 11 Geo. 1. Smart v. Taylor.

6. A commission of lunacy was granted, and the persons who had him in their custody were desired to produce him, which they not doing, the Ld. C. Parker made an order for producing him. Afterwards on his not being produced, the wife of the lunatick was ordered to attend, and it appearing by affidavits that she had been with him, and was instrumental in removing him from place to place to evade his being produced, his lordship ordered her to be committed to the Fleet, though she was an Irish peeress. Wms's Rep. 701. Trin. 1721. Ld. Wenman's Case.

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Sec (C)

(I) Lunatick. Lord or Copyholder.

1. **L**ORD of a manor being lunatick, may by his steward, whom before his lunacy he had constituted for life, grant copyhold estates according to the custom, whether for one life in possession, or one life in possession and another in reversion; but the committees cannot grant any copyhold estate. But by way of caution it was ordered that he should grant none without the privity of the committees, nor before the Court was acquainted therewith, and gave warrant for the granting. Ley. 27. Trin. 9 Jac. Blewitt's Case.

2. Lord of a manor cannot commit or dispose of the copyhold of a lunatick, without special custom. Hutt. 17. Anon.

(K) Lunatick and Trustee enabled to transfer.

1. Stat. 4 Geo. 2. **E**Nacts, That it shall be lawful for persons cap. 10. s. 1. being ideot, lunatick, or non compos mentis, or for the committees of such, in their name, by direction of the Lord Chancellor, by an order made upon hearing all parties, on the petition of the persons for whom such ideots, &c. shall be seised or possessed in trust, or of the mortgagors, or the persons intituled to the monies secured upon any lands whereof such persons being ideot, &c. shall be seised or possessed by way of mortgage, or of the persons intituled to the redemption thereof, to convey such lands as the Lord Chancellor shall by such order direct, and such conveyance shall be good.

S. 2. Such persons being ideot, &c. and only trustees or mortgagees,

gagees, or the committees of such may be impowered and compelled by such order to make such conveyances, in like manner as trustees or mortgagees of sane memory.

(L) Pleadings.

1. [T was found by inquest of the office returned in chancery, that W. N. was seised of certain manors, and held them of the king in chief, and died seised, and the tenements descended to R. a natural fool from his birth, as son and heir, and that N. held the tenements; upon which the king sued a *scire facias* against N. to say *why the land should not be seised* into his hands, for the ideocy of R. who came and said, that R. such a day released all his right to the possession of M. then tenant of the land; at the time of the making of which deed R. was of good memory; which M. infeoffed him, absque hoc, that R. was a natural fool from his birth; and it was not denied, but that the *ter-tenant may traverse the office* in this form, and after they passed over to another matter, viz. the alienation without licence * Br. Ideot, pl. 2. cites 20 Aff. 2.

* Orig. (Conus.)

2. Office found that J. S. died seised of such land by gift in tail made to him, which descended to W. his son and heir, who was an ideot, and N. came and *traversed the office*, and made title, absque hoc that the said J. S. was seised prout, &c. the day on which he died, and it was found against the king. And by Hufley and Fairfax, this case of the ideocy is not like to the case of the ward of the land and heir; for there the king shall be answered as to the tenure; but in case of the ideot, the *king shall be answered only as to the possession*; for if an ideot has title to the land by entry, or by action, if he has it not in possession yet, the king shall not have it; and so judgment was given upon the traverse for the issue was upon the possession, & *non refert, whether the ideot has right or not, if he has not possession*, quod nota. Br. Ideot, pl. 3. cites 1 H. 7. 18. & 19.

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Maeresme.

(A) To whom it appertains.

[1.] F lessee for life or years cuts timber or prostrates the houses demised, the lessor shall have the timber; for the lessor has the general ownership and property in the inheritance in the timber.

Roll. R.
178. S. C.
4 Rep. 62.
b. — But if a

house be timber. Co. 11. 81. b. Bowles's Case.—and * Liford's Case.]
lung down by tempest, and lessee

sells the timber, it is not wast; for after the defection (of which he is excused by reason of the tempest) *the timber is become a chanle*, of which no wast can be committed. 2 Roll. Wast (E.) pl. 31. cites 29 E. 3. 33. Curia.—As it seems it is so to be intended. Ibid. cites 40 Ass. 22.—* 11 Rep. 45.

Palm. 327. [2. If lessee for life or years *cuts timber trees, and barks them*
 S. C.—Jo. *and carries them away immediately*, yet they belong to the lessor
 225. S. C. *who has the inheritance; for they are parcel of the inheritance,*
 —Cro. C. *and the lessor may have trover and conversion for them, though*
 242. S. C. *he never seised them before the carrying them away, and that*
 —5 Rep. *the lessee carried them away immediately after the cutting and*
 76. b. Pa- *barking, so that all was but one intire act. between Bertie*
 get's Case *and Herd, adjudged upon a special verdict in B. R.]*
 And lessor may bring a bill in chan-

cery, because it may be impossible to discover the value; that being in the possession of him that cut it; per Ld. Ch. Macclesfield; and that in such case, where there were trees blown down by the storm, and several tenants for life, with remainder to their first, &c. son in tail, but neither of them having any son, the timber was decreed to the *first remainderman in tail*. 2 Wms's Rep. 241. Mich. 1724. cites it as the Case of the Duke of Newcastle v. Vane.

So where after the remainder limited to the first, &c. son of B. in tail male, the remainder was further limited to C. and D. and the heirs of their bodies, remainder to the feoffor in fee, and A. and B. had no sons, and C. died without issue, where- by the heir of the feoffor, as to [143]
 [3. If a feoffment be made of land to the use of A. for life, the remainder to the use of his 1, 2, 3, and other sons in tail, the remainder to the use of B. for life, the remainder to the use of his 1, 2, 3, and other sons in tail, and after B. has issue C. a son, whereby he is tenant in tail in remainder, and after A. not having any son cuts timber trees, and then sells part of the timber coming off the trees, and after C. seises the residue of the timber coming off the trees, and A. re-seises it, C. may have trover and conversion against A. for all the timber; for the mere property of the trees is in him who has the immediate inheritance of the land at the time of the cutting of them. And though the remainder for life to B. is an impediment of an action of wast during his life, yet it is not any impediment to C. as to the property of the trees, being severed from the land, which B. cannot have for the debility of his estate; and the possibility of the estate, which may come to the son of A. if A. shall have any son, is not any impediment, inasmuch as it is a mere possibility, which peradventure never will happen, and is nothing in law till it happens, and may be destroyed by the feoffment of the lessee. Mich. 24 Car. B. R. between Uvedale and Uvedale. Adjudged upon a special verdict. Intratur Tr. 23 Car. B. R. Rot. 694.]

one moiety of the premises had the first estate of inheritance; A. having cut timber sold it, and the heir of the feoffor brought his bill for an account of a moiety of the timber. And Ld. Ch. Macclesfield held, that the right belonged to those, who at the time of its being severed from the freehold were seised of the first estate of inheritance, and that the property becomes vested in them, and his lordship thought the bill for an account proper, in order to discover the value, and that A. the defendant was not to be allowed what money he had laid out in timber for repairs, since his selling shewed, quo animo he cut it down. 2 Wms's Rep. 240. Mich. 1724. Whitfield v. Bewit.

So if tenant for life leases for years, excepting the timber, &c. and lessee for years assigns his lease to remainderman in fee, he in remainder cannot sell any trees, though he may carry away any that were felled before. Ley. 20. Sir Allen Percy's Case.

Tenant for life, remainder for life, remainder in fee; tenant for life cuts timber; the property belongs to remainderman in fee. 5 Rep. 76. b.—And he may seise them, though he cannot bring action of waft during the mesne remainder for life. Allen 81. Udall v. Udall.

4. If trees are *blown down* by the wind, quære, if lessee shall not have them? For 44 E. 3. in waft it is ruled, that lessor shall not have waft or trover for them against lessee, if he takes them. D. 90. b. 9.

Lessor shall have *windfalls*; per Anderfch. 4 Leo. 166. Lewknor's

Case.—143. Arg.—*Windfalls*, which have timber in them, belong to those in reversion; but if *dotards*, which have no timber in them, then tenant for life may have them. Mo. 812. Countess of Cumberland's Case.—Roll R. 181. S. P. Bowles v. Berrie.—4 Rep. 63. 9. Herlackenden's Case.

5. If the timber be *carried off into another's land, and hewed out or cut into boards*, lessor may take them. Mo. 19.

But if the trees are *fixed on the land*, or if a *house* is made of the timber, it is otherwise. Qu. Mo. 29.

6. If *lessee covenants to repair*, and the groundfels are rotten, he may cut timber to repair them. Mo. 23. pl. 80.

7. If *lessee for years without impeachment of waft cuts trees*, and leaves them on the land, and dies, his *executors* shall have them, and not the lessor. Arg. 4 Le. 139.

8. *Birches* in such countries, where they are necessary for use in building, are timber, and belong to the inheritance, and not to tenant for life. Mo. 812. Countess of Cumberland's Case.

9. *Feme tenant in tail after possibility without impeachment of waft* by force of the clause (without impeachment of waft) shall have timber of *houses blown down* by the wind, and *trees*, and when they are severed from the inheritance, either by act of the party, or the law, and become chattels, the entire property of them is in the tenant for life, by force of the said clause. 11 Rep. 84. Lewis Bowles's Case.

4 Rep. 63. Herlackenden's Case. Contra.

10. If a *house falls per vim venti*, tenant, *for life, years, in dower, by curtesy, &c.* have a *special property* in the timber, to *re-build* such a house with the timber, as the other was, for his habitation. 11 Rep. 82.

11. If lessor grants that *lessee may do waft*, he may convert to his own use. 11 Rep. 83. in Lewis Bowles's Case.—Cites 3 Ed. 3. 44. a. b. Walter Idles's Case.

12. If trees are *aridae*, lessee shall have them; for then they are fuel. Arg. Roll. R. 181.

13. *Absque impetitione vasti* gives a power to fell and sell. 11 Rep. 81. Roll. R. 183, 184. Bowles v. Berrie.

b. LEWIS BOWLES'S

Case. acc. But 4 Rep. 63. HERLACKENDEN'S Case is that tenant for life dispunishable of waft shall not have the trees. Arg. 2 Roll. R. 325.—But *absque impetitione vasti* per aliquod *breve de vastis* discharges only the action, but doth not give the property, and the lessor after the cutting may seise the trees. 11 Rep. 82. b. Lewis Bowles's Case.—Co. Litt. 352. 2. o.

See Trees, Waft, and other proper Titles.

Magistrate.

(A) His Power.

1. **M**ayor or magistrate may *send for any* to examine him, and is not bound to shew the cause in his warrant, nor is it necessary for the officer to know the cause. Cro. J. 81. v. Bowcher.

2. A *contemptuous carriage* and behaviour to a magistrate is a breach of the good behaviour, and he to whom such affront is offered may bind to the good behaviour, or, if he has no sureties, commit him till he find some; per Holt Ch. J. Farr. 29. the Queen v. Rogers.

Maihem.

Fo^l. 112.

(A) What shall be said a Maihem.

1 Le. 139,
So of cutting
the thumb
or nose —

[1. **A** Maihem may be committed in cutting off my *fingers*. 25 E. 3. 43.]

1 Jo 18 — So knocking out one's *fore teeth*, putting out one's *eye*, &c. it is otherwise of knocking out his *grinding teeth*, cutting off one's *ear*, *nose*, &c. for these are but deformities; for maim is the wrongful spoiling of a member defensive in fight. Fin. Law. 8. 204.

[2. A maihem may be committed in cutting off my *finger next to the little finger*. 28 E. 3. 94. per Seaton.]

1 Le. 139.
Case of Mal-
let v. Fer-
rers.—cites 28 E. 3. 54. per Stone.

[3. So a maihem may be committed in cutting off any of my *fingers*. 28 E. 3. 94. per Seaton.]

S. P. So of
breaking his
knee, strik-

4. Any hurt to a man's body, *whereby he is rendered * less able in fighting*, as the cutting off, disabling or weakening a hand or

or finger, striking out an eye, or fore tooth, or castration, &c. are properly maihems, and come under the notion of felonies; but the cutting off an ear or nose are not properly maihems, because they do not weaken a man, but only *disfigure* him. Hawk. Pl. C. Abr. 124. f. 1.

ing off his arm, cutting off his leg or foot, or whereby he loses the use of any of his

said members. Co. Litt. 288. a. — * S. P. 2 Hawk. Pl. C. Abr. 146. f. 5.

(B) What shall be good Cause of *Justification*.

[1.] It is good justification of a maihem, *that the plaintiff who is maimed assaulted him, and he fled from place to place, and the ill which he received was upon his own assault.* 25 E. 3. 41. admitted by issue. 28 E. 3. 94.]

Son assault demesne is a good plea in maihem, where the first assault

was violent. 2 Salk. 642. Cockroft v. Smith

2. The *defence* of a man's *possession* will not justify a maihem, but only the defence of his *person*. 2 Hawk. Pl. C. Abr. 148. f. 10. [145]

(C) Appeal. Bars.

[1.] It is a good bar in appeal of maihem, that the plaintiff was *non-suited in other appeal after appearance* of the defendant. 40 E. 3. 1. adjudged.]

[2. In appeal of maihem it is good bar, that the plaintiff hath recovered in a trespass of assault, battery, and wounding, which is the same battery and wounding for which this appeal is brought, for in both actions damages are to be recovered, and he hath recovered damages in the trespass for the wounding, which makes the maihem, and therefore the defendant shall not be punished for it again. Adjudged Co. 4. 43. Hudson and Lee.] 2 Hawk. Pl. C. cap. 23. S. 22.

3. It is a good plea in bar of appeal of maihem, that the plaintiff assaulted the defendant in such a manner as endangered his life; but it seems that the common plea of son assault demesne, without some special circumstance, is no bar of a grievous maihem, as the cutting off a leg, &c. For such a revenge bears no proportion to the provocation. 2 Hawk. Pl. C. Abr. 147. f. 10.

4. Notwithstanding an appeal of maihem supposes the fact to have been done feloniously; yet, inasmuch as at this day it only subjects the appellee to damages, it may be barred by an arbitrement, or by an accord with satisfaction executed; or by a release of all manner of appeals; or by a release of all manner of demands, or by a release of all manner of actions, or by a release of all actions personal, or by a nonsuit in a former appeal after

after appearance. But a nonsuit in an action of trespass is no bar of an appeal of maim. 2 Hawk. Pl. C. Abt. 148. f. 11.

(D) What Court may take Cognizance of it, and How.

1. *Inferior Courts* have power to judge on view of maim, and to *increase damages*; and per Pemberton Ch. J. a barbarous battery, as cutting the nose may be *construed* maim for the increase of damages. 2 Jo. 183. anon.—Vent. 353. reports, that per Cur. none but the Courts at Westminster can increase damages upon view. Anon.

(E) Punished. How.

1. *It* is said, that *anciently castration* was punished *with death*, and *other maims* with the loss of *member for member*; but *afterwards* no maim was punished in any case with the loss of life or member; but *only* with *fine and imprisonment*. 1 Hawk. Pl. C. 112. cap. 44. f. 3.

If a man attack another of malice forethought, in order to murder him with a bill, or any other

[146]
such like
instrument

2. But 22 & 23 Car. 2. cap. 1. enacts, That if any on purpose and of malice forethought, and by lying in wait, shall cut out or disable the tongue, put out an eye, slit the nose, or cut off a nose or lip, or cut off or disable any limb or member of any subject of his Majesty with intention to maim or disfigure him, such persons, counsellors, aiders and abettors shall suffer death, as in cases of felony, without benefit of the clergy.

Provided that no attainder of such felony shall corrupt the blood, or forfeit the wife's dower.

which cannot but endanger the maiming him, and in such attack happens not to kill, but only to maim him, he may be indicted on this statute together with all those who were his abettors, &c. and it shall be left to the jury on the evidence, whether there were a design to murder by maiming, and consequently a malicious intent to maim as well as to kill; in such case the offence is within the statute, though the primary intention was murder. 1 Hawk. Pl. C. 112. cap. 44. f. 6.

Mainprize.

(A) In what Actions, Suits or Things [Persons] may be mainprised in Writ of Error.

[1.] If a man be in execution for debt upon judgment in B. and brings writ of error in B. R. *de rigore juris*, he ought not to be put to mainprize in B. R. 7 H. 6. 28. b.]

[2. But he may be let to mainprize by special grace. 7 H. 6. 28. b.]

[3. But the diversity is if writ of error be brought in parliament upon judgment in B. R. 7 H. 6. 28. b.]

[4. But if a man be in execution upon judgment in B. R. and he says, that * he will sue a writ of error at the next parliament, he shall not be let to mainprize upon this suggestion. 7 H. 6, 29.]

Fol. 113.

(B) In Audita Querela.

See audita querela (B. 2.)

[1.] If the audita querela be grounded upon a matter of writing, he shall be let to mainprize; because it is apparent to the view of the Court. My Reports 14 Ja. B. R.]

[2. If the audita querela be grounded upon a matter in fact, he shall not be let to mainprize; for it may be false, and then he shall be out of execution by this false suggestion. My Reports 14 Ja. B. R. Piers.]

[3. If A. recovers damages against B. and takes him in execution, and after B. purchases a manor, to which A. is a villain regardant, and upon this matter B. sues an audita querela, yet he shall not be let to mainprize; because the audita querela is grounded upon a matter in fact. 41 E. 3. Audita Querela 18.]

[4. If an infant sues an audita querela upon a statute for infancy; after which he is inspected by the Court, and found within age, he shall be let to mainprize. 20 E. 3. Audita Querela. 27. adjudged.]

5. Four men sued audita querela upon a statute merchant, so that they were in execution, and the one appeared, and the other three were not there, but the fourth made the suit for all; and because they cannot do this without being there in person, or by attorney, or by mainprize, therefore capias was awarded against them, and that he who appeared should sue writ to let him to mainprize. Br. Mainprize, pl. 82. cites 29 Aff. 41.

6. In

6. In audita querela, they *were at issue, and nisi prius granted,* and therefore the plaintiff was by mainprize notwithstanding the
 [147] statute; and per Persey, he shall be by attorney at the nisi prius. Br. Mainprize, pl. 14. cites 46 E. 3. 32.

7. In audita querela the *plaintiff, upon sufficient defeasance pleaded,* would have been by mainprize, and could not before the *venire facias returned*; quod nota. Br. Mainprize, pl. 16. cites 47 E. 3. 25, 26.

8. The *conusor upon statute merchant* in audita querela shall not be by mainprize *before he has given some answer*; quod nota. Br. Mainprize, pl. 18. cites 48 E. 3. 1.

9. Where the *conusor finds mainprize to appear from day to day till judgment* rendered upon audita querela sued, and he appears at the day of the inquest, and when they come to say their verdict, he makes default and is *non-suited*, this is a *forfeiture of the mainprize*, which was of the sum in the statute; by which the conusee prayed execution against the conusor, and against the mainpernors also, of the sum, &c. and could not have both, but shall hold him to the one by award; quod nota; by which he *took the conusor, his lands and goods, and relinquished the mainpernors*. Br. Mainprize, pl. 21. cites 50 E. 3. 12.

10. He who sues audita querela shall find *surety of the sum*. Br. Mainprize, pl. 92. cites 11 H. 6. 31.

* Manuten-
entia is of
two sorts,
viz. *curialis*,
i. e. in
Courts of
justice pen-
dente pla-
cito; and
ruralis, i. e.
to stir up and
maintain
quarrels,
viz. com-
plaints,

* Maintenance.

(A) ** Embracery.

1. [F a man gives money to a † juror, impanelled to give his
verdict for one of the parties to the action, this is em-
bracery. 11 H. 6. 11.

suits, and parts in the country, other than their own, though the same depend not in plea and this is punished with great severity. 2 Inst. 213.—Co. Litt. 368. b.—Mo. 816, S. P.—1 Hawk. PL. C. 249. cap. 83. f. 2, 3.—** See (R) pl. 2.—See Embracery.

† He who *laboureth the jury*, if it be but to || appear, or if he *instruct them, or put them in fear,* or the like, he is a maintainer, and he is in law called an embraceor, and the action of maintenance lies against him, and if he take money, a decies tantum may be brought against him. And whether the jury pass for his side or not, or whether they give any verdict at all, yet shall be punished as a maintainer or embraceor, either at the suit of the king or the party. Co. Litt. 369. a.—And Serjeant Hawkins says, it seems clear that *any attempt whatsoever to corrupt or influence, or instruct a jury, or any way to incline them to be more favourable to the one side than to the other, by money, promises, letters, threats, or persuasions, except only by the strength, and the*
argu-

arguments of the counsel in open Court at the trial of the cause is a proper act of embracery. Hawk. Pl. C. 259. f. 1.—|| It is embracery as well in the party himself as in a stranger. Mo. 816. Jepps v. Tunbridge.

It is said that generally the giving of money to a juror after verdict, without any precedent contract in relation to it is an offence *avowing* of the nature of *embracery*; because if such practices were allowable, it would be easy to evade the law by giving jurors secret intimations of such an intended reward for their service, which might be of as bad consequence as the giving of money before hand. Hawk. Pl. C. 259. f. 3.

It has been adjudged, that the bare giving money to another to be distributed among jurors is an offence of the nature of embracery, whether any of it afterwards be actually so distributed or not. 2 Hawk. Pl. C. 259. f. 4.

2. Maintenance against 2, because the plaintiff had action of covenant in C. against J. N. upon which they were at issue, and the jury returned, and the defendant came and gave money to the jury, scilicet, to J. K. and so of each, and spoke great words to them, in maintenance of the quarrel of the defendant to the damage, &c. Norton said, it appeared, that the defendant is an embraceor, by which the plaintiff ought to have decies tantum, &c. judgment, &c. Per Hanke, an embraceor is he who takes upon him to make the inquest appear, scilicet, a leader of inquests; [148] by which the defendant said, that he was attorney of the defendant in the writ of covenant, judgment si actio; and per Cur. an attorney cannot give any thing to the jury; wherefore he said, that he was attorney, and gave evidence to the jury for his client, absque hoc, that he gave, &c. or did other maintenance, and the other e contra, that he gave, &c. And as for the other he said, that he was bailiff and returned the pannel, and summoned the jury to appear, absque hoc, that he did other maintenance, and the other e contra; and per Thirn. and Cur. attorney, sheriff, bailiff, &c. ought not to give rewards to the jury for the party, nor any promise to them. And Thirn. said, that speaking of great words is not maintenance. Br. Maintenance, pl. 9. cites 13 H. 4. 16.

(B) Champerty. What shall be said * Champerty, [and when Writ of Champerty may be brought, pl. 5.]

[1.] F + pending a real action a stranger purchases the land of the tenant in fee for good consideration, and not to maintain the plea, this is not champerty, though by intendment the stranger for his interest will aid the tenant in his plea. 21 E. 3. 10. b. 52. by issue. Contra 50 Aff. 30.]

pute, or some profit out of it. 1 Hawk. Pl. C. 256. cap. 84. f. 1.—Co. Litt. 368. b.—+ He who purchases bona fide pending the writ is a champertor; for it is against the statute, and also by intendment he will maintain to eschew his own loss. Br. Champerty, pl. 8. cites 50 Aff. 3.—And it was held by the justices, that there is no diversity where a man sells his land pending the writ, and where he gives it; because it is prohibited by the law, that none shall purchase pending the writ. Br. Champerty, pl. 10. cites 8 E. 4. 13.—But it was touched, that a man may make feoffment to his use pending the writ, because the feoffee has nothing to his own use. Ibid.

[2. If a man purchases land of B. pending a suit in chancery against B. by A. for the land, this is not champerty, though the Purchase of lands in another's name pur-

* See (B. 2) (M) pl. 7.

—Champerty is the unlawful maintenance of a suit in consideration of some bargain to have part of the thing in dispute.

+ He who purchases bona fide pending the writ is a champertor; for it is against the statute, and also by intendment he will maintain to eschew his own loss.

Purchase of lands in another's name

*pending a
suit in chan-
cery for it,
and after
rule for
publication
was given in
the cause,*

purchaser has conusance of the suit. Pasch. 9 Car. B. R. in an information against *Hill* and *Winston*, upon the 32 H. 8. of maintenance per Curiam agreed; and Rich. then said, that it was so lately resolved in Master *Brownlow's* Case, upon reference to certain judges out of the Star-Chamber.]

went off on another matter, so no judgment. Het. 164. Archbishop of Canterbury v. Hudson.

[3. If a man *maintains the tenant in a praepe quod reddat to have part of the land*, a writ of champerty lies; because this is champerty, as well as if he had maintained the demandant. 21 E. 3. 10. b. 52. 30 E. 3. 4. adjudged.]

*Br. Cham-
perty, pl. 7.
cites S. C.
2 Inst. 563.
—1 Hawk.
Pl. C. 257.
cap. 84. f. 9.

[4. If a man *undertakes to maintain one party for part of the land pending the plea*, though he doth not purchase it of him pending the plea, yet this is champerty, * 30 Aff. 15. adjudged. 33 E. 3. 4.]

Fol. 114.

[5. If a man maintains one party to have part of the land, it is *champerty immediately, before the other hath lost the land*; for he may have writ of champerty pending the plea. 47 Aff. 5.]

6. The father may *enfeoff his son pending the plea*; for a man may have aid of sages, and of his friends. See the statute of articuli super chartas, cap. 12. and quære; for by the opinion of Herle Justice, a man may have aid of sages and of his friends. Br. Champerty, pl. 11. cites 6 E. 3. & F. N. B.

[149]
* S. P.—
2 Inst. 563.

7. If the *tenant in a real action grants a * rent, common, or other profit apprender out of the land*, to maintain, &c. this is champerty; and yet the rent, common, &c. is not in demand, but they are profits out of the land, 2 Inst. 209.

8. If one *recover land*, and be *in possession by writ of seisin*, he may sell it, though he was not in possession, nor any ancestor or other by whom he claims by the space of a year next before; yet in such case, if any *new suit be commenced before the sale*, this shall be champerty, but not punishable by 32 H. 8. but by the ancient statutes. Mo. 655. Mowle's Case.

9. An attorney following a cause to be *paid in gross*, when it is recovered, is champerty. Hob. 117. in Case of Box v. Barnaby.

10. A counsellor took a *bond* of his client conditioned *to convey one half* to him of the estate on recovering the whole; the Court declared that the bond ought to secure what was actually *disbursed*, and to make *reasonable allowances for care*, &c. in the recovery. Mich. 32 Car. 2. Fin. R. 477. Skapholm v. Hart.

(B. 2) Statutes as to Champerty.

1. *WEST. 1. 3 E. 1. cap. 25.* enacts, That no * officers of the king by themselves, nor by other, shall maintain pleas, suits, or matters hanging in the † king's Courts for lands, tenements, ‡ or other things, for to have part or profit thereof by ¶ covenant made between them; and he that doth, shall be punished at the king's pleasure.

* *Ld. Coke* in his 2 *Inst.* 207. calls them *ministri regis*, and says it was taken in that king's time to ex-

tend to the judges of the realm; and cites a record, in which record, and many other of that time (*ministri regis*) extends to the judges of the realm as well as to them that have ministerial offices——† By these words are intended only his Courts of Record. 1 *Hawk. Pl. C. 257. cap. 84. f. 4.*—‡ Within these words are included leases for years, and other goods and chattels, debts and duties. 2 *Inst.* 209.—¶ Under the word covenant, which in a strict sense signifies only an agreement by deed, all kinds of promises and contracts of this kind are included, whether they be made by writing or by parol. 1 *Hawk. Pl. C. 257. cap. 84. f. 5.*

Maintenance in consideration of a rent granted out of land in variance is within this statute; but rent granted out of other lands is no way within the purview of it. *Ibid.* f. 2.

2. *West. 2. 13 E. 1. cap. 49.* enacts, That the chancellor, treasurer, justices, or any of the king's council, clerks of chancery, exchequer, nor any justices, or other officer, or any of the king's house, clerk or lay, shall not receive any church or advowson, land, or tenement in fee, by gift, or by purchase, or to farm, by champerty, or otherwise, so long as the same thing is in plea, nor shall take any reward thereof in pain to be punished at the king's will, both buyer and seller.

This statute extends only to the officers therein named, and not to any other persons.—

1 *Hawk. Pl. C. 257.*

cap. 84. f. 12.—And it so strictly restrains all such officers from purchasing any land hanging a plea, that they cannot be excused by a consideration of kindred or affinity, and they are within the meaning of the statute by barely making such a purchase, whether they maintain the party in his suit or not, whereas such a purchase for good consideration, made by any other person, or any tenant, is no offence, unless it appear that he did it to maintain the party. *Ibid.* f. 13.—2 *Inst.* 484.

3. 28 *Ed. 1. stat. 3. cap. 11.* enacts, That none shall take upon him a business in suit with an intent to have part of the thing sued for, neither shall any upon any such covenant give up his right to another; in pain that the taker shall forfeit to the king so much of his lands and goods as do amount to the value of the part so purchased for such maintenance, to be recovered by any that will sue for the king in the Court where the plea hangeth. This shall not prohibit any to take counsel at law for the fee, or for his parents or friends.

In the construction of this statute, the following points have been holden, 1. That a conveyance executed hanging a plea, in pursuance

of a bargain made before, is not within the meaning of it. 2d. That champerty in any action at common law, whether it be real, personal, or mixt, is within this statute; also, it seems the better opinion, that the purchase of land, while a suit of equity concerning it is depending, is within the purview of it. 3d. That a lease for life or years, or a voluntary gift of land hanging a plea is as much within the statute as a purchase for money. 4th. That a surrender made by a lessee to his lessor is not within the meaning of it; for since the lessor may lawfully [150] maintain his lessee without such a surrender, surely a fortiori, he may do it after the surrender. 5th. That no conveyance, or promise thereof, relating to lands in suit, made by a father to his son, or by any ancestor to his * heir apparent, is within the statute, since it only gives them the greater encouragement to do what by nature they are bound to do. 6th. That the giving part of the land in suit after the end of it to a counsellor for his wages is not within the meaning of it, if it evidently appear that there was no kind of precedent bargain relating to such gift; but it seems dangerous to meddle

meddle with any such gift, since it cannot but carry with it a strong presumption of champerty.
 1 Hawk. Pl. C. 258. cap. 84. S. 14, 15, 16, 17, 18, 19.——* S. P. Sav. 96. Mich. 30 &
 31 Eliz. in Case of Finch v. Cockaine.

4. 33 Ed. 1. enacts, That none of our Court of pleaders, apprentices, attornies, stewards of great men, bailiffs, or any others, shall take any plea or suit to champerty, or for maintenance, in pain that they, together with the consenters thereto, shall suffer three years imprisonment, and be fined at the king's will.

5. By 32 H. 8. 9. all statutes concerning maintenance, champerty and embracery, shall be put in execution.

(C) In what Actions it may be [Champerty.]

S. P. Br. Champerty, pl. 2. cites 47 E. 3. 9. per Kirton and Finch.——* So of other personal actions. 1 Hawk. Pl. C. 257. cap. 84. S. 6.——See (B. 2) pl. 3. in notis.

[1.] IF a man maintains in an action of * debt to have part of the money, this is champerty as well as if he had maintained in a plea of land. 47 Aff. 5.]

(C. 2) Champerty. In what Cases it lies.

1 Hawk. Pl. C. 257. cap. 84. S. 8.

1. A Man shall have champerty, though he has lost nothing, and where the plea is yet pending. Br. Champerty, pl. 2. cites 47 E. 3. 9.

2. In champerty the defendant said, that before the formedon brought in which the maintenance is supposed, the tenant for 100 l. to him paid sold the land to the defendant, and that the tenant in the formedon was seised to the use of the defendant at the time of the formedon brought, absque hoc that he purchased the land to maintain modo & forma; and per Cur. if a man takes upon him to maintain and promises to do it, and after does not maintain, action does not lie, and the traverse above is good; per tot. Cur. Br. Champerty, pl. 9. cites 9 H. 7. 18.

3. Quære, if champerty lies upon suit upon subpœna; for the statute makes mention only of plea, and therefore quære if subpœna be plea or not. Br. Champerty, pl. 6.

(C. 3) Champerty. Who shall have it, and against whom.

And the disseisor may have one writ of champerty, and the tenant another. Ibid.——S. P. though the disseisor has nothing in the land; because he may be charged with damages. 2 Inst. 563.

1. THE disseisor in assise who lost damages shall have writ of champerty against the maintainer in the first action as well as the tenant. Br. Champerty, pl. 2. cites 47 E. 3. 9. per Kirton and Finch.

2. If

2. If the demandant be *nonfuit*, yet he may have an action of champerty. 2 Inst. 563.

3. If the tenant makes a *feoffment in fee hanging the writ*, if one does maintain the demandant to have part, the *feoffor* shall have the action of champerty; for he remains tenant to the demandant. 2 Inst. 563.

(C. 4) Champerty. Writ, Proceedings, Count and Pleadings.

1. **C**hamperty against two, because they took a plea to maintain, and purchased the land in debate to champerty and shewed between whom the plea was moved, and of what tenements. Skipwith demanded judgment of the writ, because it is not said * for which party they purchased to maintain; & non allocatur; for non-tenure in this action is no plea; by which they said that they purchased of one B. who was seised of the tenements for his money, *absque hoc*, that they purchased the tenements to champerty; Prist; and the others e contra. Br. Champerty, pl. 4. cites † 22 E. 3. 10.

* If writ of champerty does not make mention for whose part the defendant maintained to have part of the thing in demand, the writ shall abate, by which the

plaintiff brought another writ. Br. Champerty, pl. 13. cites 22 H. 6. 7. — Ibid. pl. 5. cites F. N. B. — † It should be 21 E. 3. 10. b. pl. 33. — And see Br. Nontenure, pl. 17. which cites 21 E. 3. 10. S. C.

2. Champerty was brought and in the writ no mention was made of imprisonment by three years, and fine to the king according to the statute of Westm. 2. nor of Westm. 1. and therefore upon search made it was said to the plaintiff, that he shew by what statute his writ is warranted, or otherwise his writ shall abate; and so it seems there that the statute ought to be rehearsed in writ of champerty. Br. Champerty, pl. 1. cites 20 H. 6. 30, 31.

3. In champerty, devers demanded judgment of the writ; for the party is not named of what mystery he is and what addition, because in this action lies process of outlawry, and it was said that process of outlawry lies in maintenance and conspiracy, and not in champerty, by which it was awarded that he answer. Br. Champerty, pl. 5. cites 21 H. 6. 7. and 22 H. 6. 7.

(D) At Common Law.

[1. **T**HERE was a maintenance at common law, and the statute only adds a more grievous pain. 11 H. 6. 11.]

[2. There was a maintenance at common law for which the maintainor might be indicted. 22 E. 3. 1.]

[3. 7 E. 1. Rot. Clauso. Membrana. 19. The king sent a writ to the justices itinerant of Trent commanding them to enquire of men, qui quasdam detestabiles confederationes & malas allegationes prestitis

prestatis mutuo sacramentis & amicorum, & benevolorum suorum partes in placitis & loquelis ipsos tangentibus in comitatu illo utpote in assisis, juratis, & recognitionibus fallaciter manutenendis & defendendis, & ad inimicos suos fraudulentè & quantum in ipsis est plerumque exheredandos inter se facere temere præsumpserint, & si quos inde culpabiles inveniatis, sine dilatione capi, & in prisona nostra salvo custodiri faciatis donec aliud inde præceperimus, &c.]
[Eodem modo to the other justices in eyre.]

[152]

* See (R)

pl. 1.—

Intent (D)

—Main-

tenance is the

unlawful

main-

tenance of a

suit in consideration of some bargain to have part of the thing in dispute, or some profit out of it.

Hawk. Pl. C. 256. S. 1.—And is either by word, writing, conveyance or deed. 2 Inst. 212.—

* S. P. Br. Maintenance, pl. 22. cites S. C.

(E) * *What shall be said Maintenance.*

[1.] If a man becomes a bail for another, in a suit, and after *sues to save the party and mainpernors*, [† this is not maintenance;] for it is lawful for him to endeavour to save the mainprise. 14 H. 6. 6. b.]

Br. Mainte-

nance, pl.

12. cites S.

C.—Main-

tenance; per Markham, the defendant is sheriff of the county of N. and party, for that, &c. he came to him, and said, that the now plaintiff had a capias against him, and prayed him to give him his counsel what is best to be done, and he counselled him to purchase supersedeas in C. B. which is the same maintenance, &c. Judgment, &c. and per tot Cur. it is not maintenance; for every man may so give counsel; for otherwise none may counsel his friend, nor one husbandman give advice to another; for that which ought to be justified, ought to be a maintenance justifiable; but if it be not any maintenance, then the general issue suffices. Br. Maintenance, pl. 17. cites 22 H. 6. 35.—And after Markham added to the plea *absque hoc* that he is guilty of any other maintenance; per Cur. this is no plea clearly, for no maintenance is confessed. Ibid.—Wherefore he said *ut supra* *absque hoc*, that he is guilty of the maintenance supposed by the writ; per Brown, nothing shall be entered but not guilty. Markham said, enter it as you will. Quod nota bene. Ibid.—A man is in no danger of being guilty of maintenance, in giving another friendly advice what action is proper for him to bring for the recovery of a certain debt, or what method is safest to take to free him from such an arrest, or what counsellor or attorney is likely to do his business most effectually; for it would be extremely hard to make such neighbourly acts of kindness, which seem rather commendable than blame-worthy, to come under the notion of maintenance, which always seems to imply a contentious and over-busy intermeddling in other men's matters, in which respect it is so highly criminal. Hawk. Pl. C. 250. S. 9.

* The sense

here seems

imperfect;

and Hob.

115. S. C.

is, that it

was not in

effect and

truth his.

[3. If a man buys a title in this manner, that if he can recover he shall pay 200l. otherwise nothing; though he has taken estate in the land, and so maintains his own title, yet till he recovers, * it is not in effect; and it was not intended that he shall have it for nothing, so that all the time till recovery he maintains it at the peril of the owner, and this is but a *subtlety and fraud*; and therefore is maintenance punishable in the Star-Chamber. Hobart's Reports 161. *Flower's Case*. And there quere, whether it lies upon the statutes at the common law Courts?]

[4. If a man makes J. S. his attorney to recover a certain debt, where this J. S. is not an attorney allowed in the Court where the

Suit is, but he prosecutes the suit by force of this warrant, this is maintenance; for otherwise a man may make such warrant of attorney to any great man, and may lawfully sue, &c. Pasch. 37 El. B. between Constantine and Barnes said, that it was the Ld. of Lincoln's Case in the Star-Chamber, where he was censured for it.]

[5. So if a man makes J. his general attorney to prosecute all his causes, if he sues in his name, this is maintenance. Pasch. 37 El. B. per Curiam, between Constantine and Barnes.]

General attorney who sues in the chancery, and is not

learned in the law, may well meddle, but cannot proffer money to the inquest, but may pray them to appear. Br. Maintenance, pl. 7. cites 34 H. 6. 25. per Chocke.

[6. If a solicitor laies out money in a suit for his client upon a promise of re-payment, whether this be maintenance? See Mich. 13 Ja. B. between Leach and Penton. Mich. 12 Ja. B.]

Fol. 115.

1 Hawk. Pl. C. 254.—

S. 27.—W. brought an action upon the case against G. and declared, that whereas he, at the request of the defendant, did solícite and prosecute an action of trespass between the said G. plaintiff, and J. S. defendant; the said G. did promise to pay the said W. 100l. [153] The defendant pleaded non assumpsit, and it was found for the plaintiff. It was moved in arrest of judgment, that the solíciting and the prosecuting of another man's suit was not lawful for any, but for an attorney or counsellor of law. But the Court did all agree, that it is lawful to be a solícitor, if it be not for maintenance, or that he lay not out money for maintenance. Hob. 67. Mich. 22 & 23 Eliz. in B. R. Worthington v. Gaston.

7. 1 R. 2. 7. None shall give liveries for maintenance of quarrels, or other conspiracies, in pain of imprisonment and grievous forfeiture to the king; and the justices of assise shall diligently enquire of such as gather together for such purposes, and shall punish them according to their demerits.

Hawk, Pl. C. 256. cap. 83. S. 42.— In action upon the statute of liveries,

Fulth. said, as to one robe given to A. this same A. was retained with us for a year, taking for his salary 20s. in the office to be our receiver of certain tenements in D. judgment si actio; and it was challenged, because he did not shew of how many lands or tenements; and it is said, that he need not to do it, nor to shew what salary he gave him. And as to another he said, that he was his steward of his courts of the manor of D. judgment, &c. And as to another, that he was his menial man, and in his house, and to go and ride with him, and to serve him as his valet. And as to another, that he was his parker of his park of L. and to all others not guilty, and not guilty was held no plea, but shall answer to the writ, that he did not give the robes. Br. Action sur le Statute, pl. 14. cites 8 H. 6. 9. 10.

8. A man alleged gift of a livery to B. against the statute, and that the defendant took it, and after used it, and did not say where he used it, and therefore ill by the best opinion. Br. Pleadings, pl. 75. cites 5 H. 7. 17.

A man was indicted for giving of liveries; but nothing was mentioned

of the wearing of liveries in the indictment; and therefore, per Keble, the indictment is not good; but by Wood, the giving of liveries is an offence without the wearing. Br. Indictments, pl. 30. cites 6 H. 7. 12.

9. Speaking of great words is not maintenance, per Thirne. Br. Maintenance, pl. 9. cites 13 H. 4. 16.

10. If he who has nothing to do with the matter, and who is not learned in the law will shew to the jury, or to the party, or his counsel, the truth of the matter, and all circumstances as perfectly

1 Hawk. Pl. C. 250. cap. 83. s. 6.

as a man learned in the law, yet it is maintenance. Br. Maintenance, pl. 14. cites 21 H. 6. 15, 16. and 22 H. 6. 5. per Ascue.

1 Hawk. Pl. C. 250. S. 7. S. P.— It is said, that a man of great power, not learned in the law, may

11. If a man of great power in the country will say in presence of persons, that he will expend 20l. for the one party, or will give 20l. for labour for the party, yet if he does not give any thing in fact it is maintenance; for it may be, that those who are of the jury dare not pass against the will of the great man. Per Newton Ch. J. Ibid:

be guilty of maintenance, by telling another who asks his advice, that he has a good title. Hawk. Pl. C. 250. f. 9.— But a bare promise to maintain another is not in itself maintenance, unless it be either in respect of the publick manner in which, or the power of the person by whom it is made. Ibid. S. 7.

12. The giving money for labouring the jury is maintenance, though they are not laboured in fact. Per tot. Cur. Ibid.

13. And if a man threatens the jury to beat them, in case they will not pass for such party, it is maintenance; per Paston. Ibid.

14. And maintenance at one day pending the suit is maintenance during all the suit, and yet release made after this day is a good plea. Quod nota. Ibid.

S. P. For such kind of practices do not only tend to dis-

courage the other party from going on in the cause, but also to intimidate juries from doing their duty. 1 Hawk. Pl. C. 250. cap. 83. S. 7.

If a man doth assist [154] one who is plaintiff in

the Star-Chamber, it is not maintenance, because it is for the benefit and advantage of the king; but if a man doth assist an informer in another Court in an information upon a penal law, the same is such a maintenance, for which he may be punished in this Court. Mich. 6 Jac. in the Star-Chamber. Godb. 159.

16. If a man labours to indict me, by which I am indicted, it is maintenance; for the indictment is the action of the king, and the statute prohibits it in all quarrels and actions; per Newton. But Paston to the contrary thereof. Ibid.

17. Decies tantum; by some of the justices, if a man impanelled and returned upon issue takes money of the one party for his verdict, and after is not sworn upon the issue, yet decides tantum lies, and some e contra, and that action of maintenance lies, quod nota. Br. Maintenance, pl. 15. cites 21 H. 6. 54.

S. P. Br. Maintenance, pl. 51. cites 31 H. 6. 9.

A bond assigned to a subject where the

18. If A. gives money to B. to lay out in a suit between C. and D. and B. does not distribute it, yet A. is punishable in maintenance, and if B. does distribute it, it is maintenance in both. Jenk. 101. cites 29 H. 6. F. Maintenance 11. 21 H. 7. 40.

19. If a man assign an obligation to another for a precedent debt due by him to the assignee, there that is not maintenance; but if he assign it for a consideration then given by way of contract, that

that is maintenance. Noy. 52. Harvey v. Bateman.—Cites assignor is not indebted to the assignee, and for that debt is maintenance. 3 Le. 234. South v. Marsh.—If the assignment wants a good consideration, it is void; for it will be maintenance. Arg. 10 Mod. 223. cites 3 Le. 234. Noy. 52. Cro. E. 552. 170. 34 H. 6. 30. Br. Maintenance, 8. 1 Bulst. 187.—But if surety pays the debt on which obligee promised him to sue the principal on the same bond, and to pay the surety what he should recover, &c. this is no maintenance. Palm. 189. Morris v. Badger.

20. Prayer of judgment by a juror is maintenance; per Jen- S.P. because after a juror has given his verdict, he has nothing more to do. 1 Hawk. Pl. C. 256. cap. 83. S. 8.—But it was held by all the Court in B. R. that he may exhort his companions to pass for the party as he thinks the right to be, and this is no maintenance. Br. Maintenance, pl. 39. cites 17 E. 4. 5.

21. If a juror gives money to any of his companions for any party, it is maintenance, and he shall be punished; per all the justices, quod nota. Br. Maintenance, pl. 32. cites 18 E. 4. 4.

S. P. though it be done for the right of the matter.—Br. Maintenance, pl. 39. cites 17 E. 4. 5.

22. 32 H. 8. 9. enacts, That no person shall bargain, buy or sell, or by any ways or means obtain any pretended rights or titles, or take any promise, grant or covenant to have any right, &c. of any person, &c. of or to any minors, &c. unless he who shall sell, &c. the same or those under whom he claims have been in possession thereof, or of the remainder or reversion thereof, or have taken the rents or profits thereof for one whole year next before the bargain, &c. made, upon pain that the person selling, &c. shall forfeit such lands, &c. and the buyer or taker thereof, the value of such lands, &c. one moiety to the king, &c. and the other to the party that will sue for the same by action of debt, &c.

* Though the statute says rights or titles in the plural number, yet the singular number is contained in the plural, and within the statute. Pl. C. 86. b. Hill. 6 & 7 E. 6. Partridge v. Strange.—S. P. Co. Litt. 369. a. b.—For the better understanding of this statute, you must observe, that title or right may be pretended two manner of ways. 1st. When it is merely in pretence or supposition, and nothing in verity. 2dly. When it is a good right or title in verity, and made pretended by the act of the party, and both these are within the said statute; for example, if A. be lawful owner of land, and is in possession, and B. who hath no right thereunto, granteth to, or contracteth for the land with another; the grantor and the grantee (albeit the grant be merely void) are within the danger of the statute; for B. hath no right at all, but only in pretence. If A. be disseised in this case, A. hath a good lawful right, yet if A. being out of possession, granteth to, or contracteth for the land with another, he hath now made his good right of entry pretended within the statute, and both the grantor and grantee within the danger thereof. A fortiori of a right in action. Quod nota. Co. Litt. 369. a.

It is further to be known, that a right or title may be considered three manner of ways. 1st. As it is naked and without possession. 2dly. When the absolute right cometh by release, or otherwise, to a wrongful possession, and no third person hath either jus proprietatis, or jus possessionis. The third, when he hath a good right, and a wrongful possession. As to the first, somewhat hath been said, and more shall be said hereafter; as to the second, taking the former example, if A. be disseised, and the disseisee release unto him, he may presently sell, grant or contract for the land, and need not tarry for a year; for it is a rule upon this statute, that whosoever is the absolute owner of any lands, tenements or hereditaments (as in this case the disseisor is) may at his pleasure bargain, grant or contract for the land; for no person can thereby be prejudiced or grieved; and so if a man mortgage his land, and after redeem the same, or if a man recovers land upon a former title, or be remitted to an ancient right, he may at any time bargain, grant or contract for the land, for the reason aforesaid. As to the third, if in the case aforesaid, the disseisor died seised, and A. the disseisee entereth, and disseises the heir of the disseisor, albeit he hath an ancient right, yet seeing the possession is unlawful, if he bargain or contract for the land before

before he hath been in possession by the space of a year, he is within the danger of the statute, because the heir of the disseisor hath right to the possession, and he is thereby grieved; & sic de similibus; and albeit he hath a pretended right (and none in verity) but getteth the possession wrongfully, yet the statute extendeth unto him, as well as where he is out of possession. Co. Litt. 369. a.

† 1 Hawk. Pl. C. 265. cap. 86. S. 15. —† It was agreed by Montague Ch. J. and all of the Serjeant's Inn in Fleet-street, that if a man *mortgages* his land, and redeems it, he may sell his land within one year next &c. without danger of the statute aforesaid; for so is the *intendment* of the statute; for the *ancient statutes are that none shall maintain*, and yet a man may maintain his cousin, and so the like; for it is not intended but of *unlawful maintenance*, and so of *pretended title*, and not of that which is clear title. Br. Maintenance, pl. 38. cites 6 E. 6. —|| 1 Hawk. Pl. C. 265. cap. 86. s. 15.

J. S. possessed of a term granted it to T. S. his brother, 12 May 20 Eliz. and afterwards 8 October 321 Eliz. he himself being in possession mortgaged the same to J. N. who suffered him to continue in possession. T. S. granted his estate to J. S. who mortgaged it to G. who let J. S. continue in possession till 10 December 22 Eliz. when G. entered. J. S. was indebted to B. and C. and requested J. N. to grant his estate in the premises to B. and C. for security of their money, to which J. N. consented, provided J. S. would find him other security for his debt; whereupon J. S. proposed the said C. and B. and J. N. accepted them, and at J. S.'s request, granted his interest to them. 2d. of February 22 Eliz. the said J. N. having notice of the grant of G. In an information by G. against J. N. Periam and Mead J. held, That J. N. was not within the penalty of this statute, because J. N. granted his interest to B. and C. at the request of J. S. who was the mortgager to secure the debt he owed them, and therefore it shall not be intended that that grant was made for any unlawful maintenance against the statute. Besides J. S. had possession, and received the issues and profits of the said lands for a whole year before the grant, notwithstanding he was not in possession for a whole year before the day of the date of the grant. 3 Le. 78. Mich. 24 Eliz. C. B. Stamp's Case.

As if A. be in possession or hath received the issues and profits for a whole year, and afterwards a stranger enters upon him and hath possession for a quarter or half a year, yet he who was in possession for a year before, may grant his interest without danger of the statute &c. 3 Le. 79. Mich. 24. Eliz. C. B. in Stamp's Case.

†† So, if he enters upon the disseisor himself, and sells &c. For notwithstanding his entry was lawful, and he had both the absolute property and possession of the land; yet inasmuch as the disseisor claims a title to it, which is yet in dispute, such a sale by the disseisee seems within the intent of the statute, which meant absolutely to restrain all persons from transferring their disputed titles to any stranger whatsoever. 1 Hawk. Pl. C. 265. cap. 86. s. 16.

Note, The words of the statute be (*any pretended right*) therefore a lease for years is within the statute; for the statute saith not (the right, but any right) and the offender shall forfeit the whole value of the land. But yet if a man makes a * lease for years to another to the intent to try the title in an *ejilione firme*, that is out of the statute, because it is a kind of a course of law; but if it be made to a great man, or any other, to sway or countenance the cause; that is within this statute. Co. Litt. 369. a. 369 b. —* 1 Hawk. Pl. C. 264. cap. 86. s. 12. —S. P. if made by a superior to an inferior. 2 Brownl. 271. Trin. 7 Jac. C. B. Anon.

Lease or promise for years made against the form of the statute is within the danger of the statute as well as estate for life in tail or in fee; for if a lease, promise or bargain may be made for one year, it may for two, and so on to 10 or 100 &c. and a man will maintain as much for such estate as for an estate for life &c. and the words are (*any right or title*) in which case if he had fee and promised a lease for years, this is a right or title, and is contained under the word (any); and under this word (any) the less estate shall be contained in the greater. Pl. C. 87. a. Hill. 6 & 7 E. 6. Partridge v. Strange and Crocker.

If A. pretends title of fee simple in land, and B. takes a lease of him for 100 years, where A. who pretends had not been in possession by the space of a year &c. according to the statute B. shall be punished by the statute, which prohibits any to obtain &c. or take, promise or grant to have the pretended right or title of any person; and yet he does not obtain the pretended right or title of the lessor; for his right or pretended title is fee simple, and not of estate for years; for otherwise he may take lease for 5000 years &c. and so defraud and frustrate the statute. 2 And. 57. in Case of Smith v. Colehill.

But he who gains the possession of lands, by virtue of a judgment at law in affirmance of an ancient title cannot come within the meaning of this statute in respect of any lease made of such lands; for it can never be imagined, that it was the intent of the statute to oblige all persons, who should recover their lands, to occupy them themselves, which would be generally inconvenient, and often wholly impracticable; and therefore it must be admitted, from the necessity of the case, That such persons may lawfully lease their lands and houses to proper tenants, to be manured and occupied for the usual rents; but if it shall appear, that the title to such lands is still contested notwithstanding such recovery, and that such lease was in truth designed for the maintenance of the title, Serjeant Hawkins says, he can see no reason why it should not be as much within the statute as any case whatsoever. 1 Hawk. Pl. C. 265. cap. 86. s. 16.

If a man has a *lawful title* to enter into lands, but has not been in possession, and he enters, and makes a lease for years thereof, it is within the statute; for *the mischief is*, he would let it to another to have the maintenance and embracery, and make contentions and suits, and to remedy this, the statute was made; for if a man has title, he may recover according to his title; [156] per Anderson Ch. J. and Periam J. agreed thereto, and said, that if a man recover *informedon or cessavit*, and make a lease, it is not within the statute, though he has not been in possession for a year, and he thought the plaintiff need not prove that it is a pretended right, because the statute expounds what is a pretended right, viz. if he hath not been in possession. Goldsb. 101. Slywright v. Page.

The case above was, that a man was seised in fee, and made a *feoffment* to J. S. to the use of himself, and M. his intended wife, and to the heirs of the husband. The marriage took effect, and then the husband made a *feoffment* to a stranger, and died, afterwards M. before she was in possession, made a lease for years to a half brother, the defendant by indenture without any entry or delivery of the deed upon the land, he knowing that she never had been in possession. The Court held this lease within the statute, though objected that being made by one out of possession, and not sealed or delivered upon the land, was not good in law, as to pass any interest; for by means of this pretended lease, the possession might be disquieted; for amongst the vulgar people it is a lease, and it is a lease by reputation. Le. 166. Slywright v. Page.

Mo. 266. S. C. is, that the lease was made to try the title.—But Goldsb. 101. S. C. says nothing of its being made to try the title.—And. 201. S. C. acc.—1 Hawk. Pl. C. 294. cap. 86. §. 14.

But if one that has not been in possession offers a lease to J. S. who was ignorant of the lessor's not having been in possession, and J. S. agrees and takes a lease, in this case J. S. is not within the statute; per Anderson Ch. J. Goldsb. 101. in Case of Slywright v. Page.

† † Also where the statute speaks (of any right or title to lands &c.) A customary right or pretence thereof to lands holden by copy is within this statute. Co. Litt. 369. b.

If one, who has a pretended right or title to copyhold lands, bargains and sells it to another, this is within this statute; for the statute says, *if any bargain, buy or sell &c. any right or title* in, or to any lands or tenements; so that these words (any right or title) extend to all manner of rights or titles, and by consequence to copyhold lands. And a great part of the land of the realm is granted by copy, and therefore the intention of the makers of the act was to include this for the avoiding of suits, maintenance and champerty, and not to leave all copyhold estates to the mischiefs mentioned in the preamble of the said act. Per Wray Ch. J. 4 Rep. 26. a. Pasch. 31 Eliz. B. R. in Case of Kite v. Queinton.—S. P. 2 Brownl. 134. in Case of Bagnal v. Tucker.

Provided that it shall be lawful for any person being in † lawful possession of the thing, whercunto title is made, by taking the yearly profits to buy or obtain by any reasonable way or means the pretended right of another person to the same. This proviso (which is rather added for explanation than of any necessity)

extendeth only to a pretended right or title, and not to a good and clear right, and therefore without question, any that hath a just and lawful estate, may obtain any pretended right by release or otherwise; for that cannot be to the prejudice of any; nay, as hath been said, a *disseisor*, that hath a wrongful estate, may obtain a release of the disseisee, and that is not within the body of that act, and consequently standeth not in need of any proviso to protect him. Co. Litt. 369. b.

* S. P. And it seems clear, that such a release cannot come within the meaning of the statute, if the disseisee had the true title, and no other had any pretence of title to the land; for in such case it is clear, that the end of the release is not for maintenance, but for the settlement of all disputes. But if such a disseisee had had but a contested title, and such release were intended only to enable the disseisor to defend himself with the dubious title of his disseisee, surely it cannot but be as much within the meaning of the statute as any conveyance to one wholly out of possession. 1 Hawk. Pl. C. 265. cap. 86. S. 17.

And therefore if there be tenant for life; the remainder in fee by lawful and just title, he in remainder may obtain and get the pretended right or title of any stranger, not only for that the particular estate, and the remainder are all one; but because it is a mean to extinguish the seeds of troubles and suits, and cannot be to the prejudice of any. Co. Litt. 369. b.

And where the statute saith, (being in lawful possession by taking the yearly rent &c.) those words are but explanatory, and put for example; for howsoever he be lawfully seised in possession, reversion or remainder it suffices, though he took profit. But the matter observable upon this proviso, is, that if a disseisor makes a lease for life, lives or years, the remainder for life in tail or in fee, he in remainder cannot take a promise or † covenant, that when the disseisee has entered upon the land or recovered the same, that then he should convey the land to any of them in remainder, thereby to avoid the particular estate, or the interest or estate of any other; for the words of the proviso are (buy, obtain, get, or have by any reasonable ways or means) and that is not by promise or covenant to convey the land after entry or recovery; for that is neither lawful, being against the express purview of the body of the act, nor reasonable, because it is to the prejudice of a third person.

But the reasonable way or mean intended by the statute is by release or confirmation, or such conveyances as amount to as much; and this agrees with the letter of the law, viz. the pretended right or title of any other person; and rights and titles are by release or confirmation, as by reasonable ways and means lawfully transferred and extinct; and the words of promise or covenant &c. which are prohibited by the body of the act, are omitted in the proviso. Co. Litt. 369. b.

† S. P. Because such a covenant seems to favour as much of maintenance, as if they had been strangers to the land. 1 Hawk. Pl. C. 266. cap. 86. S. 17.

‡ A. seised of land infeofed W. R. and W. S. upon condition to enfeof him and M. his wife, remainder to D. his youngest son in tail, with divers remainders over, but not shewing to whom. And the estate was executed accordingly; afterwards A. made a new feoffment to the same trustees, on condition to re-enfeof him and his second wife for life, remainder to B. his second son in tail &c. B. procured the deeds of the first entail to be cancelled. A. died, D. entered and took the profits. B. purchased the title of J. N. who was not in possession. An information was brought against B.

[157] and a copy or draught of the first deed written by the defendant himself was produced, by which it appeared, that the remainder for want of issue of D. was limited to B. upon which the question was, whether B. in the last remainder might buy a pretended title by the proviso in the statute. And when D. after A.'s death entered for the forfeiture, he devised all the new remainders, and re-continued the former. And therefore it was insisted for B. the defendant, that this was no offence within the statute, because the remainder and particular tenant make but one estate, and the seisin of the one is the seisin of the other. But it was answered, that by the buying the title of the particular tenant he intended to defeat all the first remainders, and also the intention of the statute, as appears by the words, ought to be taken, viz. That he who buys a pretended title ought to be in possession by the taking the annual rents and profits which B. did not in this case. Ideo quere. D. 52. b. pl. 6, 7, 8, 9. Trin. 34 H. 6. Anon.—‡ Orig. (l'estatute).

• A stranger wrote to a juror returned praying him to appear at the day, and to do in the cause according to his conscience. Adjudged Maintenance. 2 Le. 134. Mich. 28 Eliz. cites it as one Gifford's Case.

Applying to a juror by one that is no party to the suit by word or writing to appear is maintenance, otherwise by a party to the suit. Mo. 816. Jepps v. Tunbridge &c.—Goldsb. 182. pl. 120. Maidston v. Hall.—cites Gifford's Case.

The prosecution to be within one year.

23. A. possessed of a rectory for term of years was ejected by B.—C. by A.'s commandment re-enters to his use, and after B. continues the possession, and A. within four days after grants all his interest which he had in the said land, to C.—This grant was good enough, notwithstanding that at the time of the grant he had not possession, and that the grant was made out of the land. Dal. 56. pl. 1. 6 Eliz. Waly v. Burnell.

Promise to pay so much to A. for his labour about the business of J. S. is Maintenance.—

Yelv. 197. cites Onily's Case.—D. 355. b. Onily's Case. See Cart. 230. per Vaughan Ch. J.

24. A widow in consideration, that the plaintiff at her request had taken great pains, and expended 1500 l. on her suits, and other business depending, promised to pay all the charges which he had expended, and 200 l. more when required. Dyer thought the consideration good, and lawful and charitable, viz. to aid and ease a feme sole in her widowhood in her affairs, suits, and quarrels, which well may be out of suit in law divers ways. And the word depending is not of necessity intendible to be inter partes litigantes in actione dependent' in aliqua curia legis, &c. and then it cannot be maintenance; so he concluded his argument with the plaintiff, and the plea in bar insufficient. D. 355. b. 356. b. Pasch. 19 Eliz. Onely's Case.

25. A.

25. A. by indenture between him of the first part, B. his son and W. R. and W. S. of the second part, *covenanted with B. his son to assure lands to the said W. R. and W. S. and their heirs before such a feast to the use of A. for life; and then follows, viz. And it is agreed, that the said A. may assign part to his wife, part to his daughters, and part to his bastards, the remainder of the whole upon the determination of estates so to be limited to the use of B. and the heirs male of his body, the remainder to the use of C. bastard of A. and the heirs male of his body, remainder over; and covenanted that he and all others, &c. should stand seised to the uses aforesaid.* And further it was agreed, That if any to whom the inheritance is appointed as before, should do any act to the prejudice of the inheritance of any person to whom any estate is limited, then such person's estate should cease, and W. R. and W. S. be seised to the use of him and his heirs, to whose use the inheritance is next limited according to the purport thereof; by force of which A. was seised for life, and surrendered to B. After which a fine came, &c. was levied by B. and W. S. to W. R. with warranty and proclamations, by which C. entered and demised to J. N. to the intent that J. N. should bring ejectment. An information was brought against C. setting forth that he was not in possession, nor had any right of entry, &c. and that A. is living and B. is dead. It was insisted for the defendant, that it appears by the information, that when B. made the lease he had nothing in the land, and so the lease merely void; for it is not alleged to be made by deed indented, nor upon the land, nor in such other manner as to be accounted any lease, and consequently no offence against the statute. It was agreed to be * no lease, but yet it was said an offence against the statute; because *the words of the statute are to be understood according to the common understanding, and speech which passes between person and person, and not in the dark sense according to the operation of law.* And the Court agreed, that B. took not any use by the indenture for want of a consideration to vest the use in him (fatherly love not being sufficient to convey any thing to a bastard) and so the uses void as to him, notwithstanding it is by way of remainder; and adjudged for the plaintiff. And. 75. Trin. 19 Eliz. Gerrard v. Worleley.

26. Applying to the steward of the lord of a liberty to return an indifferent jury, and not of knights and esquires, because the dispute concerned a lord of a manor, and the steward representing the matter to his lord, &c. is not maintenance. 2 Le. 133. Mich. 28 Eliz. Ld. Cromwell v. Townsend.

If sheriff returns a jury at the denomination of any person, it is a misdemeanor in him, and it

may be maintenance in the person at whose request it is done; per Cur. 12 Mod. 564. in Case of Turner v. Burnaby.

27. If a bond be for performance of covenants contained in a lease, and lessor assign the lease, he may assign the bond also, because they are concomitants, and he hath an interest in the lease, and therefore he may sue the bond; but if the covenants

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* 1 Hawk.
Pl. C. 264.
cap. 86. S.
14.

are first broken, and afterwards he assign over the lease, if the assignee sue the bond, it is directly maintenance; but if after the assignment, the covenants are broken, it is no maintenance to sue; but if he *assign over the bond, and reserve the lease* in his own hands, *and then the covenants are broken*, and the other sue the bond, it is maintenance. Argued Arg. Godb. 81. pl. 96. Mich. 28 & 29 Eliz. B. R.

It is usual among merchants to make exchange of

money for bills of debt, and it is no maintenance; and per Gawdy J. it is no maintenance to assign a debt with a letter of attorney to sue for it, except it be *assigned to be recovered, and the party to have part of it*. Cro. E. 170. Penson v. Hickbed.—Assignment of a debt or recognizance to a stranger is an illegal and void consideration. Cro. J. 552. Barrow v. Grey.—*Buying of debts* is maintenance at common law, and punishable by information, and indictment. Jenk. 108. pl. 6.—Unless it be by the *debtee* of the vendor. Jenk. 292. pl. 35. cites Lane v. Mallony.—All. 60. Hodson v. Ingram.

29. *Damages to be recovered* for trespass, battery, &c. cannot be assigned over, because they are as yet *uncertain*, and perhaps the assignee may be a man of great power, who might procure a jury to give him the greater damages. Arg. Godb. 81. pl. 96.

* The case here seems to be not rightly stated in the report, and that the word (males) is omitted; and this appears more plainly afterwards.

30. A. seised in fee gave lands to B. and the heirs * of his body, remainder to C. and the heirs male of his body, remainder to the right heirs of A.—B. died having issue a daughter.—C. made a lease for years of the lands. The Court held this to be no maintenance within the statute; for he in remainder may make a lease for years. 2 Le. 48. pl. 63. Trin. 33 Eliz. C. B. Taylor v. Brounsal.

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31. Then it was given in evidence, that a *common recovery was had against B. with single voucher, and so the remainder limited to C. destroyed, and that after that recovery C. made the lease*; but it was answered by the other side, that the recovery was never executed, and so no discontinuance of the remainder, and then the lease made by C. was good. And the truth of the case was, that such recovery was had, and an *hab. fac. seisinam* awarded, and returned, but no execution was had upon it, nor the recoveror never entered. And whether C. who is a stranger to the said recovery, shall be admitted against the recovery to say that no execution was, was the question, and therefore all the matter was found by special verdict. 2 Le. 48. Taylor v. Brounsal.

32. Also it was given in evidence, that the land was given to B. and the heirs male of his body; and then when the daughter, who is not in truth inheritable, enters, whether such entry (she being privy in blood to C. her uncle) shall be a *disseisin or abatement*, &c. as in the Case of Littleton, where the youngest brother enters after the death of the father? For in such case, the youngest son does not get any freehold, but is only a tenant at sufferance.

sufferance. And Anderson held, that when the daughter enters and takes a husband, who leases for years and the lessee enters, the same is a disseisin; but Periam doubted; for he said, when the younger son entered, the freehold was in him, which Anderson doubted. 2 Le. 48. Taylor v. Brounfall.

33. If *the king's lessee* for years be ousted by a stranger, yet though he be out of possession, he may assign over his term; for the reversion being in the king, he cannot be out of possession but at his pleasure. Cro. E. 275. Hill. 34 Eliz. C. B. Wingalt v. Mark.

34. Action upon the statute of maintenance for *maintaining a suit in the Spiritual Court*. Warberton moved, that this action lay not: for the statute of 1 R. 2. cap. 4. whereupon the action is founded, is to be intended *only of maintaining suits in the Courts of common law*: and upon view of the statute, the whole Court was of that opinion, and willed him to demur. And Drew remembered a Case in the Court Pasch. 37 Eliz. between CONSTANTINE v. BARNS, whereupon it was ruled, that no action lay for maintaining a suit in the Spiritual Court. Cro. E. 594. Mich. 39. 40 Eliz. C. B. Tisdale v. Bedington.

Goldsb. 113. pl. 1. S. C. by name of Tisdale v. Altree. And per tot. Cur. the word *alibi*, in the statute means the King's Court only. —Noy. 68. S. C. by the nor 1 R. 2.

name of Tisdall v. Bevington. That such maintenance is neither within. 32 H. 8. cap. 4.

35. One of the defendants, supposing that he had title to certain lands, which were in the possession of the plaintiff, *contracted to sell them to one other of the defendants, and sealed a lease to another of the defendants for years to try the title*, and this to the use of him *for whom the contract was made*; but nothing was done upon it, nor any action brought, and the year and day long since expired, and before any bill exhibited in the Star-chamber; yet all the defendants were fined there this term, because it is *maintenance at the common law*, though not upon the statute of 32 H. 8. because of the year expired. Mo. 751. Hill. 1 Jac. in the Star-Chamber. Leigh (Sir Oliffe) v. Helyar Barker & al.

S. C. cited 1 Hawk. Pl. C. 262. cap. 86. §. 1. For all practices of this kind are by all means to be discountenanced as manifestly tending to oppression, by giving

opportunities to great men to purchase the disputed titles of others, to the great grievance of the adverse parties, who may often be unable or discouraged to defend their titles against such powerful persons, which perhaps they might safely maintain against their proper adversary.

36. A. was out of possession, and recovered in an *ejectione firme* in May 2 Car. & *habere facias possessionem* was awarded; and 29 September 4 Car. he sold the land; and whether he might sell presently or not was the question. It was determined, that he being put in possession by writ might sell presently, and so it was holden in Sir JOHN OFFEY's Case, 7 Car. in this Court. Croke J. took a difference between a recovery in a real action, and in an ejectment adjourned. Godb. 450. Hill. 8 Car. B. R. the King v. Hill.

Per Barkley J. If a disseisor recovers in ejectment, and he afterwards sells the land, it is a pretended title. Godb. 450. in Case of the King

v. Hill.—If in a *formedon* a man be out of possession 7 years, and then recovers, he may sell the land presently; per Jones J. said to have been so adjudged 36 Eliz. in C. B. in Page's Case.—Per Croke J. there is a difference where the recovery is in a real action, and where it is in an ejectment. Godb. 450. in the Case of the King v. Hill.

37. A *suit in chancery* cannot make a pretended title nor maintenance. Godb. 450. Hill. 8 Car. B. R. cites it as resolved by all the judges of England in *Brownlow's Case*.

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It is not lawful for

any man to *meddle in the cause* of another, if he have not an interest in the thing; for otherwise it will be maintenance. Arg. Golds. 81. Reynolds v. Truelock.

39. Upon indictment for barretry the evidence was, that one G. was arrested at the suit of another in an action for 4000l. when in truth, he owed him nothing; and coming before the Ld. Ch. J. to put in bail the defendant solicited against him. Sed per Cur. this is not barretry, unless defendant knew that there was no cause of action after the action brought, but it might be maintenance. 3 Mod. 97. Anon.

If a custom be in question betwixt the lord of the manor and a copyholder, all the other

copyholders may expend their money in maintenance of the other and the custom. Godb. 81. Arg. Mich. 28 & 29 Eliz. B. R. Anon.

41. Not only he who lays out his money to assist another in his cause, but also he who by his friendship or interest saves him that expence which he might otherwise be put to, or but endeavours so to do, is guilty of maintenance; as where one persuades, or endeavours to persuade a man to be of counsel for another gratis. 1 Hawk. Pl. C. 249, 250. cap. 83. S. 5.

(F) *At what Time* it may be done, [or rather, at what Time being done, it shall be said Maintenance.]

Br. Maintenance, pl. 1. cites S. C.

per Martin,

and that it was not denied, and that the writ in the register is quod *manutenuit in such an action &c. pro parte J. N.* Quod nota.

S. P. yet if it plainly appear that it was given merely with a design to

assist him in the prosecution or defence of an intended suit, which afterwards is actually brought; surely it cannot but be as great a misdemeanor in the nature of the thing, and equally criminal at common law, as if the money were given after the commencement of the suit, though perhaps it may not in strictness come under the notion of maintenance. 1 Hawk. Pl. C. 250. cap. 83. s. 10.

3. Main-

[1. A Maintenance cannot be, unless he has some plea pending at the time. 3 H. 6. 54.]

[2. For if a man gives money to another before the suit commenced to aid him in the suit, and he after purchases the writ and pursues it, yet this is not maintenance, because no suit was pending at the time of the writ purchased. 3 H. 6. 54.]

3. Maintenance; if the plaintiff in any action ~~recovers~~ against the defendant, yet he may have action of maintenance against every one who maintain against him; because the statute is a prohibition in itself. Br. Maintenance, pl. 35. cites 7 E. 4. 15.

4. If I bring a writ and one maintains so that my writ is not returned, action of maintenance does not lie; for it is not of record till the writ be returned. Br. Maintenance, pl. 36. cites 10 E. 4. 19.

5. One may as properly be said to be guilty of maintenance, within the meaning of the words (*adhuc manutinent*;) in an action of maintenance for supporting another *after judgment* as for doing it hanging the plea; because the party grieved may be discouraged thereby from bringing a writ of error or attainaint. 1 Hawk. Pl. C. 250, 251, cap. 83. § 10.

(G) Justifiable. What Persons may maintain. [161]

[1.] If an issue be taken between two, whether *all the inhabitants of the vill have such prescription*, all the inhabitants may maintain the issue, though they are not parties and the lord of the vill may also; because it concerns him. 18 E. 4. 2.] Godb. 81. S. P.—As where action was brought for digging the soil, and the defendant justified, because it was a church-yard, and all the inhabitants had used to bury their dead there, all the inhabitants of the vill may maintain in this action &c. ut sup. Br. Maintenance, pl. 41. cites S. C.—1 Hawk. Pl. C. 252. cap. 83. § 18.—* S. P. 1 Hawk. Pl. C. 253. § 20.

[2. Lessee for years brings trespass, if the issue be upon the right of the inheritance the reversioner may give evidence with the lessee, and it is not maintenance. 6 E. 4. 29.] The plaintiff in trespass shall not have aid of his lessor,

for the lessor may come and give evidence with the plaintiff, and none shall have maintenance against him. Br. Maintenance, pl. 33. cites 6 E. 4. 2. per Moile J. quod nullus negavit.—S. P. for though the judgment which may be given against the lessee cannot directly bind his inheritance, yet the verdict may be a prejudice to his title, being given on a supposal of his not having a good one. 1 Hawk. Pl. C. cap. 83. § 12.

3. Maintenance against two, because they maintained for the part of J. N. in a quare impedit between the plaintiff and the said J. N. such a day, the defendant said that at another day before the day in the declaration the bishop awarded an inquiry upon right of patronage, upon which he was compelled to be sworn by the law of the church, and gave verdict for the said J. N. absque hoc, that he was guilty of any maintenance after this day, and the other e contra, and found for the plaintiff; and it was pleaded in arrest of judgment that this matter is not maintenance, because he is compelled to be sworn by the law, and by Fortescue J. the plea is good, for this is maintenance, but it is a maintenance justifiable. Br. Maintenance, pl. 5. cites 28 H. 6. 6.

So where a juror passes for the party at common law, and maintenance is brought against him, it is a good justification with traverse ut supra. Ibid.—And if a man be at bar, and another in-

forms the Court that this man can declare the truth, and prays that he be called and sworn, by which the Court swears him, and says upon his oath for the one party, this is maintenance justifiable. Ibid.—But if he had said for the one or for the other of his own head, it is maintenance punishable.

able. Ibid. — *And if jurors come to a man and pray him to inform them of the truth, and he informs them, it is maintenance justifiable. Ibid. — But if he comes to the jury of his own head, or labours to inform them, it is maintenance punishable. Ibid. by Fortescue, quod non negatur.*

As if a man is bound to J. N. to my use it is lawful for me to sue in name of the other; and cesty que use may maintain action in name of his feoffees. — Quere, for it was not adjudged. — Ibid.

But that is for such only as claim

common or custom, but it is otherwise where the tenure is in question, because the tenure of one is not the tenure of another. Mo. 788. Lord Grey's Case.

4. Maintenance by R. against S. because he maintained one F. in debt brought by F. against R. now plaintiff, the defendant said that R. now plaintiff was in debt to the said F. in 10l. and the said F. was in debt to the now defendant in 10l. by which F. assigned the debt which the now plaintiff owed to him to the now defendant in full satisfaction, and delivered to him the obligation to which the now plaintiff agreed, and also the said F. commanded the now defendant, that in case the now plaintiff did not pay that he should sue him in his name, and because he did not pay, the defendant sued in the name of F. which is the same maintenance, &c. and per Wangford and Prisot, debt which is certain may be assigned over by assent of the parties, contra of damages in trespass not recovered; for this is uncertain and because the defendant has cause to meddle, he may well justify. Br. Maintenance, pl. 8. cites 34 H. 6. 30.

5. It is justifiable in the case of common, &c. Mo. 562. Ameredith's Case.

[162] 6. A man's bail may come and see that his appearance be recorded. Br. Maintenance, pl. 7. cites 34 H. 6. 25. — But cannot maintain him any further. Ibid. pl. 42. cites 18 E. 4. 12. — 1 Hawk. Pl. C. 252. cap. 83. f. 19.

See (I).

(H) Consanguinity.

Br. Maintenance, pl. 3. cites S. C. per Babing. and Marten. —

[1. SOME books say generally that a man may maintain his blood. 9 H. 6. 64.]

— pl. 14. cites 21 H. 6. 15, 16. and 22 H. 6. 5. — pl. 17. cites 22 H. 6. 35. per Newton.

1 Hawk. Pl. C. 251. cap. 83. f. 14.

[2. So it is of him to whom the land may descend. 19 E. 4. 3. b.]

1 Hawk. Pl. C. 252. cap. 83. f. 20.

[3. So the baron may where the land may descend to his wife. 19 E. 4. 3. b.]

[4. But otherwise it is in personal actions. 19 E. 4. 3. b.]

[5. A man may stand with his kin at the bar in an action; and it is justifiable. 21 H. 6. 15. b. 11 H. 6. 42. 12 H. 6. 2. b.]

[6. So a man may pray another to be of counsel with his kin. 9 E. 4. 32.]

[7. Some books are generally, that a man may maintain his ally. 9 H. 6. 64.]

8. The

8. The son and heir may give money of his own to one to be of counsel with his father. Br. Maintenance, pl. 14. cites 21 H. 6. 15, 16, and 22 H. 6. 5. Per Ascue.

But per Markham, this is by reason of the interest,

which the heir has; but Ascue said, that he has no interest in the life of his father. Br. Ibid.—Br. Maintenance, pl. 18. per Rede J. cites 41 H. 7. 2. but should be 14 H. 7. 2. according to the other editions.—And so may the father for his son and heir; for he is bound to find him. Contra of another cousin. Br. Maintenance, pl. 7. cites 34 H. 6. 25. per Chocke.—A. pretending right to a mesuage, whereof he nor any of his ancestors were in possession by the space of a year next before &c. made a demise thereof to B. his son and heir apparent, to the intent that he should bring ejectment. This was adjudged in C. B. per tot. Cur. not to be within the intent of the statute of 32 H. 8. 9. For the general words of the statute shall not be intended to restrain the son, who is his father's heir, from maintaining him, as well for the natural duty, which he owes him, as for the immediate possibility of the inheritance which he has, which were lawful maintenances at common law. And adjudged accordingly. Sav. 95. pl. 175. Mich. 30 & 31 Eliz. Finch v. Cokaine.—S. R. Yet it hath been holden, that such a sale to a brother of the half blood, is within the meaning of the statute. 1 Hawk. Pl. C. 265. cap. 86. f. 16.—If a man makes a lease to a son, for a small term to try the title in an ejectment, it shall be intended maintenance punishable. 2 Brownl. 271. Trin. 7 Jac. C. B. Anon.

9. Brother of the half blood cannot maintain. Le. 166. Slywright v. Page.—And. 202. S. C. says, that brother of the whole blood shall not be punished by the statute, by the greater opinion of the Court.

Mo. 266. S. C.—Goldsb. 101. S. C.—S. P. But in case of brother or

cousin, if he gives any money, it is special maintenance. Br. Maintenance, pl. 20. cites 9 E. 4. 32.—It was adjudged, that a lease made by one brother to another brother, who was of the half blood, to the intent to bring ejectment, was within the restraint of the statute of 32 H. 8. 9. because there is not an immediate possibility to inherit between them. But quære, if they were brothers of the whole blood, or if it was between the father and the son, who was not his heir apparent, if it shall be within the restraint of this statute. Sav. 96. cites Mich. 30 & 31 Eliz.

(I) Affinity.

[163]
See (H).

[1.] If the father of my wife be brought into chancery, upon an attachment, I may come to comfort, and stand with him at the bar. 19 E. 4. 3. b. and it is not maintenance.]

There is a difference between attachment real and personal.—

For where the land may come to my wife by remainder, reversion, descent &c. I may maintain in action real. Br. Maintenance, pl. 43. cites S. C.

[2. Retaining counsel for his brother in law is justifiable. 6 E. 4. 5. b.]

[3. But if his feme, who causes the affinity, dies without issue, he cannot aid his brother in law. 6 E. 4. 5. b. 14 H. 7. 2.]

For the cause is determined.

Br. Maintenance, pl. 18. cites 41 H. 7. 2. Per Rede.—And it seems by Townsend Serjeant, that defendant ought to aver, that the feme was alive at the time of the maintenance; and by Markham he cannot maintain, but during her life. Quære, Br. Maintenance, pl. 34. cites 6 E. 4. 5.—S. R. so long as the same continues. Hawk. Pl. C. 252. cap. 83. f. 20.

[4. A man may stand at the bar with his ally, and justifiable. 21 H. 6. 15. b.]

[5. A man can not give his own money to a man to be of counsel with his father in law. 19 E. 4. 5.]

But the father, son, or heir apparent to

the party, or the husband of such an heiress may. Hawk. Pl. C. 252. cap. 83. f. 20.—S. P. without any expectation of re-payment. 2 Inst. 564.

[6. But

Fol. 116.

[6. But if his father borrows certain money of his son in law, and after he delivers parcel of the same to a counsellor to be of his counsel, this is not maintenance; for it is not his money. 19 E. 4. 5.]

Br. Maintenance, pl. 4. cites S. C.

[7. A man may maintain in his suit an ally, scilicet, the baron who has married the cousin of his wife. 20 H. 6. 1.]

Br. Maintenance, pl. 4. cites S. C.

[8. A man cannot justify to give money to a jury to pass for his ally. 20 H. 6. 1. b.]

[9. Nor can justify the promise of an annuity to a juror to pass for his ally. 20 H. 6. 1.]

S. P. that he may lawfully stand by him at

10. It was said, that a man may maintain for his gossip; for this is affinity. Br. Maintenance, pl. 34. cites 6 E. 4. 5.

the bar and counsel and assist him, and also pray another to be of counsel to him, but cannot justify the laying out any of his own money in the cause. Hawk. Pl. C. 252. cap. 83. f. 20.

(K) Master for the Servant.

Br. Maintenance, pl. 3. cites S. C.

[1. THE master may maintain the quarrel of his servant. 19 E. 4. 3. b. 9 H. 6. 64.]

Per Babing. and Marten.

Pl. 17. cites 22 H. 6. 35. Per Newton.

Br. Maintenance, pl. 52. cites

[2. He may give money for him, if any of his * salary be in his hands. 19 E. 4. 3. b.]

31 H. 6. 9.

per Fortescue J.—S. P. if it be with the servant's assent. Br. Maintenance, pl. 7. cites 34 H. 6.

[164] 25. per Laken.—Pleading, that the party for whom was his servant, without saying,

that the retainer was with the servant's money, was held good. For it shall be so intended. Br. ibid. pl. 44. cites 31 H. 6. 9.—Pl. 52. cites S. C. For a bar is good, if it be good to

the common intent.—The defendant justified, because the party for whom &c. was his servant,

wherefore he retained J. M. learned in the law; to be of his counsel, and did not say, that he re-

tained de propriis, for this is not lawful; and because it may be intended, that he retained with the

money of his servant, therefore it is a good bar to a common intent, quod nota, by judgment. Br.

Barre, pl. 99. cites 31 H. 6. 1.—But Br. Maintenance, pl. 14. cites 21 H. 6. 15, 16, and

22 H. 6. 5. where it was held by the Court, that the master might retain counsel with his own

money.—Ibid. pl. 6. cites 28 H. 6. 7. 12. accordingly, per Prisot.—But per Prisot, the master can

not maintain his servant unless in things done in the right of the master, or by his command.—Br.

Maintenance, pl. 7. cites 34 H. 6. 25.—In præcipe quod reddat against servant master * cannot ex-

pend his own money, because this action may proceed without loss of service, but out of the wages

he may; but where debt or trespass is brought against the servant, it is otherwise for fear of losing his

service. Br. Maintenance, pl. 24. cites 21 H. 7. 40. Per Fineux Ch. J.—Jenk. 102. pl.—

2 Hawk. Pl. C. 253. cap. 83. f. 22.

But master coming to the bar, and there speak-

[3. The master may come with his servant, and stand with him at a trial between the servant and another. 11 H. 6. 42.]

ing for his servant is maintenance, and he was committed to the Fleet. Het. 78. Selkirk's Case.—Mo. 6.—1 Hawk. Pl. C. 253. cap. 83. f. 22.

1 Hawk. Pl. C. 253. cap. 83. f. 22.

[4. So a man may for his chaplain retained in his house. 19 H. 6. 20. b.]

[5. A

[5. A man may justify the *notifying to his chaplain* retained with him in his house *whom he shall take of his counsel* for hastening his cause. 19 H. 6. 30. b. And it is there said, that this is not any maintenance.]

But the plaintiff replied, that after the retainer, and before the

maintenance, he discharged him of his service at W. in the county of M. to which he agreed; *Prift.* and the others *e contra.* Br. Maintenance, pl. 12. cites S. C.—Br. Labourers, pl. 27. cites S. C.

6. The master's *requesting a counsellor to be of counsel* with his servant against another is maintenance justifiable. Br. Maintenance, pl. 14. cites 21 H. 6. 15, 16. and 22 H. 6. 5.

7. Maintenance; the *defendant said, that he for whom he maintained was his servant, and prayed Moyle serjeant at law to be of his counsel*, by which he was of his counsel, which is the same maintenance; to which the *plaintiff said, that the defendant at the same time delivered 100 s. of his own money to J. and S. to distribute to the men of the country to maintain the quarrel of the said servant, of which he has brought his action, which was traversed and found for the plaintiff*; and it was adjudged maintenance, though the said J. and S. did not distribute the said money, because the defendant *intermeddled with a thing prohibited by the law*, by which the plaintiff recovered by judgment. Br. Maintenance, pl. 6. cites 28 H. 6, 7. 12.

8. He *cannot give money* * to jurors nor to others not learned in the law. Ibid.

* S. P. Br. Maintenance, pl.

14. cites 21 H. 6. 15. 16. and 22 H. 6. 5. Nor to deliver to the jury, nor to embrace them to pass for the party; for they cannot lawfully take money; *e contra* of them who may lawfully take money, as counsellor of the law, attorney, solicitor, officer, for process and pleas &c. per opinionem Cur.

9. In action on the case brought against *apprentice*, the master may maintain the apprentice with his money. Mo. 814. Stone v. Walter & al.

(L) Servant for the Master.

[1. THE servant may justify the *standing with his master* in a trial between him and another. 11 H. 6. 42.]

1 Hawk. Pl. C. 253. f. 23.

[2. The servant may maintain the quarrel of his master and others, and *travail in speed of the action*; for he is obliged by covenant to do diligent service. * 19 E. 4. 3. b 3 H. 6. 53. b.]

[165]
* Br. Maintenance, pl. 43. cites S. C.—

1 Hawk. Pl. C. 253. cap. 83. f. 23. S. P. if he is retained as his servant, to do all manner of service, and not for a particular occasion only.

[3. The servant may justify the *showing the muniments and deeds of his master to his counsel and jury*. 19 H. 6. 31. b.]

1 Hawk. Pl. C. 253. f. 23.

[4. The servant cannot give money to his master to aid him in the costs of the suit. 3 H. 6. 54.]

1 Hawk. Pl. C. 253. f. 23.

[5. A servant cannot give of his proper money to maintain the suit of his master. 11 H. 6. 10. b.]

1 Hawk. Pl. C. 253. f. 23.

[6. The collector and general attorney of the debts of his master cannot, in a debt brought for the master, give the money of his master to a juror to give his verdict for his master, because it is against the law. 11 H. 6. 11.]

Br. Maintenance, pl. 23. cites S. C.

[7. The servant cannot justify the menacing of the jury, viz. that they shall not stay in their houses, if they do not pass for his master. 19 H. 6. 31. b.]

See (E) pl. 7. (M) What Act or shall be said Maintenance. Man of Law.

Having received his fee, he may lawfully set forth his client's cause to the best advantage. 1 Hawk. Pl. C. 254. cap. 83. f. 26.

[1.] If a man of law gives counsel to the one party, or be a counsel with him in a trial, this is justifiable. 11 H. 6. 10.]

S. P. 1 Hawk. Pl. C. 254. cap. 83. f.

[2. If a man of the law gives of his proper money for maintenance of the suit of his client, this is not justifiable. 11 H. 6. 11.]

26.—So for a solicitor to prosecute and pay money for another. Cited Het. 129.—An attorney may lawfully prosecute or defend an action in the Court wherein he is an allowed attorney, in the behalf of any one by whom he shall be specially retained, and * may assist his client by laying out his own money for him to be repaid again, and may justify such maintenance in other Courts, wherein they are not allowed attorneys; but they are more justified by a general retainer to prosecute for another all his causes, than if they were not retained at all; and it is certain that they ought not to carry on a cause for another at their own expence with a promise never to expect a re-payment; and it seems justly questionable, whether solicitors, who are no attorneys, can in any case justify the laying out their money in another's suit. 1 Hawk. Pl. C. 254. cap. 83. f. 27.—* S. P. 2 Inst. 564.

S. P. whether the money given be his own or his clients.

[3. If the attorney of one party gives or promises any money to the jury, this is maintenance. 13 H. 4. 16. b. 17.]

Br. Maintenance, pl. 49. cites 11 H. 6. 10.

Fol. 117.

[4. So it is if a sheriff's bailiff of a liberty or other officer so do. 13 H. 4. 17.]

[5. If the attorney of one party speaks great words to the jury in maintenance of the quarrel of the part of his client, this is not maintenance. 13 H. 4. 17.]

[6. If the attorney declares the evidence of his client to the jury, this is not maintenance. 13 H. 4. 17.]

But quære, if it had been agreed between him and his client before the action brought,

[7. If he who is of counsel of the party who recovers receives parcel of the land recovered for his wages, this is not champerty punishable. 13 H. 4. 17.]

that he should have part for his wages, if it would not be champerty; contra where he recovers bona fide without such promise or agreement precedent, and then gives parcel for his wages. Br. Champerty, pl. 3. cites S. C. and 12 H. 4. 26.—S. P. 2 Inst. 564.

[166] In the construction of this statute the follow.

8. West. 1. 3 E. 1. cap. 28. enacts, That if any serjeant, pleader, or other, do any manner of disceit, or collusion in the King's Court, or consent unto it in disceit of the Court, or to beguile the Court, or the party, and thereof be attainted, he shall be imprisoned for

For a year and a day, and from thenceforth shall not be heard to plead in that Court for any man. And if he be no pleader he shall be imprisoned in the like manner by the space of a year and a day at the least; and if the trespass require greater punishment it shall be at the king's pleasure.

ing points have been holden, 1. That counsellors &c. who are not sworn, are

as much within the meaning of it as serjeants &c. who are sworn. 2. That all fraud and falsehood tending to impose upon, or abuse the justices of the King's Courts are within the purview of it, as in the following instances. 1. Where an attorney sues out an *habere facias seignum* falsely reciting a recovery in a real action, where in truth there was no recovery at all, and by colour thereof puts the supposed tenant in the action out of his freehold. 2dly. Where one brings a *præcipe* against a poor man, knowing that he had nothing in the land, on purpose to get the possession from the true tenant. 3dly. Where one procures an attorney to appear for a man, and confess judgment without any warrant. 4thly. Where one pleads a false plea, known to be utterly groundless, and invented merely with a design to delay justice, and abuse the Court; and therefore it is said, that if a client desire his attorney to plead such a plea, the attorney ought to enter upon the roll, *non sum veraciter informatus, ideo nihil dicit*. 1 Hawk. Pl. C. 254, 255. cap. 83. s. 29, 30, 31, 32, 33, 34.—2 Inst. 215.

9. In maintenance the defendant said that he was of counsel with the plaintiff, and counselled him prout ei bene licuit, which is the same maintenance, &c. and if he says that he counselled the party *pro quo*, &c. who was impleaded by the same plaintiff by *capias* to sue *super sedes*, which is the same maintenance, &c. it is no plea, and the same law if he says further, *absque hoc* that he did any other maintenance; per Markam, in *wait*, *arguendo, quare*. Br. Maintenance, pl. 48. cites 21 H. 6. 16. and 22 H. 6. 5. 6.

10. If I deliver money to an attorney to sue an action for me, it is justifiable as well for the messenger as for my attorney; but without my authority, it is maintenance as well in him that pays the money as in the attorney; per Frowike Ch. J. Kelw. 50. b. Trin. 18 H. 7.

11. When one is attorney by authority of his master, he may lawfully do every thing for his master's advantage; but if he acts without commandment and notice of his master, action is maintainable against him; per Frowike Ch. J. Kelw. 50. b. Trin. 18 H. 7.

12. An attorney may present his client's cause without fees, and yet it is not maintenance. Arg. Sti. 184. cites Trin. 16 Car. Hill v. Sands.—An attorney may stir up men to suits, if their suits be lawful; *ibid.* cites 17 Car. GIBSON v. BARTER, which Roll. Ch. J. denied, and said that stirring up of suits, and making bargains to follow them is in itself unlawful, and great inconveniences do grow by such manner of practising. *Ibid.*

13. For fees past attorney may lawfully take security of a stranger; per Ellis J. Cart. 230. Mich. 23 Car. 2. C. B. Pearson v. Humes.

(N) Who may justify in respect of Privy.

Br. Maintenance, pl. 50. cites S. C.—S. P. 1 Hawk. Pl. C. 253. cap. 83. f. 20. and there he

[1. **THE** lord may justify the * coming and standing with his tenant to assist him at a trial between his tenant and another in assise for other land than that which he holds of the lord; for a man is bound to be with his tenant. 11 H. 6. 39. b. 41, 42.]

says, that though he does not find it any where expressly holden that the lord may justify laying out his own money in defence of his tenant's title, yet it seems the better opinion, that he may as well justify it as any other acts of maintenance; for the lord by accepting a man for his tenant, seemeth to take him under his immediate protection; and inasmuch as the lands were originally derived from the lord, and he hath the continual benefit of the services due from them, the law in many cases of common right obliges him to warrant them unto his tenant; and where it does not oblige him, surely it will at least permit him to do it; but it seems clear that he cannot maintain him in respect of any lands not holden of him.

[167] [2. So he may justify praying the sheriff to make an indifferent array in it. 11 H. 6. 39. b.]

Br. Maintenance, pl. 50. cites S. C.—2 Hawk. Pl. C. 253. cap. 83. f. 20.

Br. Maintenance, pl. 50. cites S. C. per Babington and Paston.—In debt, where a feoffee in use is impleaded and

[3. *Cestuy que use at common law of a manor* may justify the coming and standing with a tenant, who holds of the manor and assist him at a trial in assise against him (for other land than that which he holds of him; for this appears because the assise was brought against him and others, and the others were not his tenants). 11 H. 6. 40.]

cestuy que use maintained him, and action of maintenance is brought against him, and he pleads this matter, it is a good plea; per Littleton, which was agreed. Br. Maintenance, pl. 30. cites 2 E. 4. 2.

* Orig. (mes atantque il doit de necessitie en venant & estoier ove son tenant).

[4. In assise against the tenant and others, the lord cannot justify the coming and standing with the others at the trial, * any further than he must necessarily so do in coming and standing with his tenant. 11 H. 6. 39. b. 40.]

1 Hawk. Pl. C. 253. cap. 83. f. 21.

[5. The tenant may justify the standing with his lord at a trial between him and a stranger. 11 H. 6. 42.]

See (E).

(O) [Who may justify.] He who has Right or Possibility.

S. P. per Babington and Martin Justices.—But Brook

[1. **I**F a man seised of a rent grants it over to another, and that he shall have the charters concerning it which are in the possession of J. S. to his own use, if he recovers them against him, and the tenant attorns to this grant; if the said grantor

grantor brings *detinue* for the charters, the grantee may maintain; because he has interest in them by reason of the rent. 9 H. 6. 64.]

tee by the grant, he ought to have had the action thereof; but it seems, that though the charters are choses in action, yet *the owner has a property* and may give them; and *e contra* it seems if a trespassor had taken them. Br. Chose in Actions, pl. 13. cites S. C.—And Paston J. held the plea not good; for if the property of the deeds was in the grantor at the time &c. then it passes to the now defendant by the sale, and then he himself ought to have brought the action, and not the grantee; and if the property was not in him, then if it was a *chose in action*, and the party put to sue for them, the defendant cannot maintain, though he has the rent. Br. Maintenance, pl. 3. cites S. C.

[2. It is not maintenance punishable for those, to whom land may come by remainder or reversion, to aid him who is tenant of the franktenement in a real action brought against him. 19 E. 4. 3. b.]

nance, pl. 18. cites [14 H. 7.] 2. Per Rede J. and not deny'd — Ibid. pl. 43. S. P. cites 19 E. 4. 3. 5. They may give money, where the land is in demand, in order to save their interest. Br. ibid. per omnes, and cites 1 E. 6. — S. P. For he who has interest in the land may maintain to save it. Ibid. pl. 59. cites 1 E. 6. — Br. N. C. pl. 373. S. C. — S. P. Br. Maintenance, pl. 14. cites 21 H. 6. 15, 16, and 22 H. 6. 5. — 2 Hawk. Pl. C. 250. f. 12.

[3. If lessee for years brings trespass, and the issue is upon the inheritance; he in the reversion may justify the giving of evidence with the lessee. 6 E. 4. 2. b.]

[4. If the tenant in fee of land brings trespass *quare clausum fregit*, and then aliens to another, and after the issue is taken upon the franktenement at the time of the trespass, scilicet, whether it was the defendant's or the plaintiff's, the alienee may justify the shewing of evidence to the jury, to prove it to be the franktenement of the plaintiff at the time of trespass done. 14 H. 6. 7. b.]

[5. If I grant, that if my tenant for life dies living me, that B. shall have the land for 10 years; if after the tenant be impleaded, B. may well maintain for his possibility. 9 H. 6. 64. b.]

ton and Martin, but adds a *quære*. — 1 Hawk. Pl. C. 251. cap. 83. f. 13. cites S. C. and says, that not only those who have a certain interest, but also those who have a bare contingency of such an interest in the lands in question, which possibly may never come in esse, may lawfully maintain another in an action concerning such lands. — Mo. 482, 483.

[6. The lord may maintain his tenant. 9 H. 6. 64.]

See (N) — Br. Maintenance, pl. 3. cites S. C. Per Babington and Marten.

[7. If a reversion be granted to E. and after, before attornment, the lessee is impleaded, E. cannot maintain, because the grant is void * without attornment. Yet in this case, if he afterwards attorn, the grant shall be good; but he cannot attorn if the plaintiff recovers. 9 H. 6. 64.]

* Fol. 118.

He may maintain after attornment, but

not before. Br. Maintenance, pl. 3. cites S. C. per Babington and Marten. — S. P. Because his possibility was wholly created by the act of the party, and could not be executed but by the voluntary attornment of the tenant, which there was no remedy to compel him to make by the common law; but perhaps the authority of this opinion may be questionable, especially if such grant

were made for good consideration; for since those who have only an equitable interest in lands, may lawfully maintain others in actions relating to those lands; and since the grantor in equity shall stand intrusted for the grantee after the grant, and the tenant be enforced by a Court of equity to attorn to him, Sergeant Hawkins says, he does not see any good reason why such grantee should be esteemed such a stranger to the land, that he may not lawfully defend an action concerning it, in the event whereof he is so nearly concerned. 1 Hawk. Pl. C. 251. 252. cap. 83. s. 15.

Hob. 9. — [8. If an action be commenced against J. S. but it concerns all the inhabitants of the town of D. or they claim the same thing upon the same title; though they are not parties to the action, yet they may appoint a man to pursue the suit, and disburse monies in it, and this shall not be maintenance. Trin. 12 Ja. B. R. Per Curiam, Hobart's Report 125. between *Ld. Howard and Bell*, and others in the Star-Chamber.]

For custom, whereof they all participate, for common, copyhold estates, or such, they may maintain one another, and contribute and be bound to one another for contribution. But not where the tenure is in question, as where they claim their lands to be freehold, or copyhold of inheritance. Mo. 562. *Ameredith's Case* cited.—Mo. 788. in *Lord Grey of Groby's Case*.—But not in the case where they claim several franktenements, or copyholds of inheritance, in which they have not a joint and equal interest. Noy. 59. *Sir Edward Meredith's Case*.

9. If a man marries my cousin who may be heir to me, it is lawful for him to aid and to maintain me in any action against me; but if the feme dies without issue, then e contra; for the cause is determined. Br. Maintenance, pl. 18. cites 41 H. 7. 2.—But should be 14 H. 7. 2.

S. P. and every one who touches the land, may maintain and well done, quod nota. Br. Champerty, pl. 6. cites S. C.—And hence it seems that he who has an interest in the land, may maintain and disburse money; for every such one has lawful interest to meddle in the matter, as it is said there. Ibid.—But contra of him who is to have part of the thing in demand, and has no colour nor cause to have it, but only for the maintenance; and so see a diversity where the promise is made for a lawful cause, and where only for maintenance, which is not lawful. Ibid.—1 Hawk. Pl. C. 252. cap. 83. s. 17.

11. A. being bound for B. has goods of B. delivered to A. as security to indemnify him. C. takes away the goods. B. brings trespass against C. for taking the goods. Maintenance by B. is justifiable, by reason of the reverting trust to B. in case A. should not be damnified. Mo. 620. *Stepney v. Morgan*.

[169]

(P) In Respect of Collateral Prejudice.

Vid. (Q) [1. IF the grantee of a rent or land with warranty be impleaded in assise; at the trial the grantee upon request may stand with him, and deliver to him evidence to plead in bar in discharge of the warranty, and this is justifiable, though he does not come in by course of the law, as by voucher or warranty of charters; for he may do it to avoid the vexation of voucher, or of the warranty of charters. 11 H. 6. 41.]

Br. Maintenance, pl. 51. cites S. C.—S. P. Because he is bound by the warranty, to render other lands to the value of those which shall be evicted. 1 Hawk. Pl. C. 252. cap. 83. s. 16.

2. Where

2. Where a man brings debt against J. N. and the plaintiff is indebted to me, and promises me, that if I will aid him against J. N. that I shall be paid off the sum in demand; if he recovers against J. N. there it is lawful for me to aid and maintain the plaintiff against J. N. because by the promise I have an interest in the sum in demand. Br. Chose en Action, pl. 3. cites 15 H. 7. 2.

colour. Ibid. — Br. Maintenance, pl. 19. cites S. C.

3. Where a man is indebted to me in 20 l. and another owes him 20 l. by bond, he may assign the bond and debt to me, in satisfaction &c. and * I may justify to sue for it in the others name at my proper costs. Br. Chose in Action, pl. 3. cites 15 H. 7. 2.

lawfully meddle in the matter. Br. Champerty, pl. 6. cites S. C. — S. P. if it be for a good consideration in satisfaction of a precedent debt due bona fide to him, and not merely in consideration of the intended maintenance; for he has an equitable interest in the debt. 1 Hawk. Pl. C. 252. cap. 83. f. 17.

4. A. makes deed of gift of sheep to B. in consideration that B. was bound for debts of A. and to save harmless B. — C. takes the sheep, and in action of trespass by B. — A. maintains, the day not being come for payment of the debt, nor B. any ways damnified; this is maintenance justifiable. Mo. 620. pl. 847.

B. be not damnified. Per Ld. Keeper, and the two Ch. J. though the day of payment of the bond was not come. Noy. 100, Hill. 43 Eliz. Stepney v. Wolfe, — S. P. 1 Hawk. Pl. C. 252. cap. 83. f. 17.

(Q) Maintenance justifiable. What Act. By a mere Stranger. Acts of Charity.

[1. IF I give gold or silver to a man, who is poor, to maintain his plea, without any ill will to his adversary (it seems it is intended in charity) this is not any maintenance against law. 9 H. 6. 64.]

Br. Maintenance, pl. 3. cites S. C. Per Bading. and Martin. — One may give money to the counsel of poor people, and it is justifiable. Br. Maintenance, pl. 4. cites 21 H. 6. 15. 16. and 22 H. 6. 5. — It is a good plea that the party was a poor man, and he gave him 20 s. of alms to defend his suit. Br. ibid. pl. 17. cites 22 H. 6. 35. Per Prisot Serjeant. — 1 Hawk. Pl. C. 253. cap. 83. f. 25.

[2. A foreigner may go with another of his country to a counsellor, and shew to him who is the best, and this is not maintenance. 19 E. 3. 3. b.]

For it is charity to aid one who cannot aid himself.

Br. Champerty, pl. 6. cites 15 H. 7. 2. — Br. Maintenance, pl. 19. cites S. C. — 1 Hawk. Pl. C. 253. 254. cap. 83. f. 25. [170]

[3. One neighbour may go with another neighbour to inquire for a man knowing in the law*. 19 E. 4. 3. b. 12 E. 4. 14. b.]

* Br. Maintenance, pl. 43. cites S. C. 1 Hawk. Pl. C. 253. f. 24.

* Br. Maintenance, pl. 43. cites S. C. [4. *So he may inform him of such a man knowing of the law* *. 19 E. 4. 3. b. 12 E. 4. 14. b.]

Br. Maintenance, pl. 43. cites S. C. [5. *But he can not deliver any money for him to the counsellor.* 19 E. 4. 3. b.]
C.—1 Hawk. Pl. C. 253. cap. 83. f. 24.

[6. *So he cannot give money to the sheriff in behalf of his neighbour to arrest another.* 12 E. 4. 14. b.]

[7. *If an ancient man of the country, who has knowledge of the title of the land, whereof another is impleaded, upon request comes with him, and stands with him to inform the jury of the title of the land, this is maintenance against the law, because he is a mere stranger, and under such pretence every man may maintain if this shall be allowed.* 11 H. 6. 41. b. dubitatur.]

* See (P) Pl. 1. [8. *So if a man grants an ancient rent over to another, and the grantee is impleaded, the grantor upon request cannot come and stand with the grantee, because of the confusance which he has of the rent, and because he has diverse evidences of it, if he be not to * warrant the rent to the grantee, for then he is but a mere stranger.* 11 H. 6. 41. b. dubitatur.]

[9. *If a man has nothing to meddle, nor lawful colour, but of his ill will maintains, this is not justifiable.* 9 H. 6. 64.]

[10. *If a stranger prays a man of law to be counsel with my adversary, this is not justifiable.* 21 H. 6. 16. 32 H. 6. 25.]

* Fol. 119. [11. *If a stranger notifies to my adversary, whom he shall take of * his counsel for hastening his cause, this is not any maintenance.* 19 H. 6. 30. b.]

(R) Gift of the Action.

S. P. And in such case he may elect to have maintenance or champerty. [1. *A* N action of maintenance lies for a champerty, if the party will; for * every champerty is a maintenance. 9 H. 6. 64. b. 14 H. 6. 8. b. admitted.]

Br. Maintenance, pl. 3. cites S. C.—* But not e converso. Br. Maintenance, pl. 19. cites 15 H. 7. 2.—Br. Champerty, pl. 6. cites S. C.—S. P. For champerty is but a species of maintenance, which is the genus. 2 Inst. 208.

[2. *If a man gives money to a juror impanelled to say his verdict for one party, though it be embracery, yet writ of maintenance lies.* 11 H. 6. 10. b.]

(S) *Conveyances or Securities given for Maintenance &c. What becomes of them.*

1. 1 R. 2. **E**Naets, That no gift or feoffment of lands or goods, shall be made by fraud for maintenance; and if any be made, they shall be holden for none. And the disseisees shall have their recovery against the first disseisors, as well of their lands as of their double damages, without regard to such alienations, so that the disseisees commence their suits within the year after the disseisin; and the same in every other plea of land, where such feoffments be made by fraud, where the feoffors take the profits.

Feoffments of this kind are only void in respect of the disseisees, but are effectual between the feoffor and feoffee &c. 1 Hawk. Pl. C. 263. cap. 86. s. 3.—A feoffment on champerty or maintenance is not void against the feoffor, but against him that has right; per Beaumont J. Cro. E. 445. in Case of Upton v. Basset.

2. A. enters into bond to B. with condition, that B. shall have such land when A. has recovered it. The bond is void; for it tends to maintenance. Arg. 2 Roll. R. 201.

3. Bond by a client to a counsellor conditioned that if he recovered the lands he would convey to the counsellor one half of the lands. The counsel dy'd, and his executors threatned to sue the bond; decreed the bond to be delivered up, and ought to secure no more than what the testator actually laid out, and reasonable allowances for his care. Fin, R. 477. Mich. 32 Car. 2, Skapholme v. Hart.

(S. 2) *Actions and Procefs. How, and against whom.*

1. **W**H E R E maintenance is pleaded by deed, the procefs upon the statute of conjunctim feoffatis shall be by writ, and not by precept. Br. Procefs, pl. 151. cites 25 Aff. 14.

2. Maintenance was by bill against one, who maintained *sedente curia*; for otherwise he shall be put to original writ of maintenance, and shall not have thereof bill as it seems. Br. Maintenance, pl. 16. cites 22 H. 6. 24. and Br. Bill, pl. 10. S. C.

3. And if a man maintains a quarrel by his attorney, action of maintenance lies against his master. Ibid.

4. Procefs of outlawry lies in maintenance; per Vavisor. Br. Procefs, pl. 110. cites 9 H. 7. 21.

(T) Pleadings.

By which he said, that before that the tenant any thing bad, T. was seised and infeoffed, the tenant in the first action upon condition to re-give to him and his heirs in tail, and because he did not

1. **C**Champerty; and rehearsed the statute &c. and that he brought writ against B. of the manor of D. and the defendant manu-cepit pro illo manerio habendo, and declared by his count, that he purchased, pending the writ, to champerty. Fish demanded judgment of the writ which is manu-cepit, where it should be *assumpsit*, et non allocatur. And per Fish, the statute extends as well to him who takes lease pending the writ, as to him who purchases in fee, pending the action. And Fish said, the writ ought to have been brought, as well against the tenant who sells or gives pending the writ, as against him who takes of him pending the writ, et non allocatur. Fish said, we did not purchase to champerty pending the writ, and durst not demur. Br. Champerty, pl. 7. cites 30 Aff. 15.

[172] re-give, T. entered upon him and infeoffed the defendant *absque hoc*, that he purchased of the tenant, or of other to champerty &c. and *absque hoc*, that he took of maintenance &c. to champerty, pending &c. and the others e contra. Br. Champerty, pl. 7. cites 30 Aff. 15.

S. P. Br. Maintenance, pl. 45. cites S. C.

2. Maintenance; that the defendant maintained in assise summoned and taken before &c. The defendant said, that the plaintiff in the assise was nonsuited, so the assise was not taken, judgment of the writ; and per Gasc, it shall abate. Br. Brief, pl. 111. cites 7 H. 4. 30.

3. In maintenance the plaintiff counted how the defendant gave to one S. E. four marks to pursue an appeal against him &c. And per Marten for law, he ought to say, that the four marks were given after the appeal was sued; for if he gives the 4 marks before the appeal sued, it is not maintenance; for it is not maintenance, unless action be pending at the time &c. quod non negatur; and also the writ in the register is quod manutenuit in such action &c. pro parte J. N. quod nota. Br. Maintenance, pl. 1. cites 3 H. 6. 53.

S. P. Br. Maintenance, pl.

4. In writ of maintenance he shall not say not guilty. Br. Action sur le Statute, pl. 14. cites 8 H. 6. 9 and 10.

46. cites 8 H. 6. 10, 11.—Br. Maintenance, pl. 11. cites 8 H. 6. 36, 37. S. P. Per Cur. But shall answer the point of the writ quod nota. Wherefore he said, that he did not maintain, Prist. and the other e contra.—S. P. Per Hewston Prothonotary, but several counsel were contra to him. Ibid. pl. 23. cites 14 H. 6. 7.—But Pr. Maintenance, pl. 31. cites 2 E. 4. 6. Contra per Chock, that not guilty is a good plea.—So of *ne maintaina par.* Ibid. and pl. 46 cites 8 H. 6. 10, 11. S. P.—Not guilty is a good plea, when the action is grounded on a penal statute, per tot. Cur. Cro. E. 257. Mich. 33 & 34 Eliz. Savery v. Tey.

S. P. Br. Maintenance, pl. 2. cites 9 H. 6. 10. by the opinion of the Court.

5. In writ of maintenance the plaintiff must shew in what Court, and before whom, the suit, in which the maintenance was had, depended at the time of the maintenance; for otherwise the defendant knows not how to answer. Arg. 2 And. 99. cites 9 H. 6. 20. and 5 E. 4. 3.

6. Main-

6. Maintenance; inasmuch as the defendant maintained C. in *curia marescall* in an action of debt brought by the plaintiff against C. Chaunt. said, *actio non*; for the defendant is cousin to C. and C. was arrested at the suit of the plaintiff, and the defendant became one of his mainpernors, judgment *fi actio*; and a good plea per Cur. at which the apprentices marvelled, because he did not confess any maintenance; for it is lawful for every one to be mainpernor; Newton said, that the defendant gave to the jurors, to some 20d. and to other some 12d. to give verdict for C. Chaunt. said, he did not give any money prout &c. and per Cur. because he is compelled to shew special maintenance, it suffices for the defendant to traverse it, and he shall not be compelled to say that he did not maintain *modo & forma* &c. Br. Maintenance, pl. 22. cites 14 H. 6, 6,

In maintenance, if the defendant renders a plea which is neither plea nor bar, as to say that the party pro quo &c. came and prayed his counsel in a suit against him by the now plaintiff by *capias*, and

the defendant counselled him to purchase a *superfedeas*, which is the same maintenance &c. *absque hoc*, that he is guilty of any other maintenance; this is no plea, per tot. Cur. because no maintenance is confessed. Br. Traverse per &c. pl. 101. cites 22 H. 6. 33.

7. Maintenance against A. for maintaining of B. in trespass brought by B. against the plaintiff in B. R. The defendant said, that J. was seised in fee of the land, where the trespass was done and died seised, and the land descended to the said B. as heir &c. by which he entred, and G. the now plaintiff entred and did trespass, and B. brought thereof action of trespass, and, pending this, enfeoffed A. now defendant, and G. pleaded not guilty claiming the franktenement to him, by which the said A. came to the jury with his evidence, and shewed how the franktenement belonged to him, judgment *fi actio*; the plaintiff said, that the feoffment was made to the intent that the defendant should labour the jury to pass in the action of trespass against this plaintiff; Newton said he enfeoffed us as we have alleged, *absque hoc* that we undertook the matter; Prist. Br. Maintenance, pl. 23. cites 14 H. 6. 7.

8. In maintenance the plaintiff said, that the defendant, such a day, year and place in this declaration, gave to W. E. 40s. of his own money, to labour the jury to pass for one M. in appeal against the now plaintiff, the which is the same maintenance of which the action is brought, and the defendant said, that he did not give 40s. to the same W. E. to labour the jury in that action to give their verdict for the said M. *modo & forma prout* &c. and so to issue, and found for the plaintiff to the damage of 100 marks. Br. Maintenance, pl. 14. cites 21 H. 6. 15. 16. & 22 H. 6. 5.

[173] But first the plaintiff replied, that the defendant gave 6s. and 8d. to J. W. to be of his counsel of his own money, and said that he would be

with the said matter, and maintain with his proper goods, and gave to them 20s. over of his own goods to spend in the matter; and by the opinion of the Court it is an ill replication. Ibid.—S. P. Br. Negativa, pl. 19. cites 21 H. 6. 16.—* Orig. [Loquela.]—Vid. Loquela, tit. Words.

9. In maintenance exception was taken to the writ, because it was *quod manutenuit in loquela appelli*, where it should be *in quodam appello*; for *appellum* is not *loquela*, and release of actions real and personal is no plea in appeal, & non allocatur. Br. Maintenance, pl. 14. cites 21 H. 6. 15. 16. and 22 H. 6. 5.

10. Main-

10. Maintenance at one day pending the suit is maintenance during all the suit, and yet *release made after* this day is a good plea, quod nota. Ibid. per Paston.

So where the plaintiff in this action supposed that the

11. *Exception* was taken to the writ *quod manutenuit & adhuc manutenet*; where he cannot maintain after the first plea determined. Ibid.

plaintiff in assise had execution, and yet well; per Ascue and Finch; for it might be that he would bring attain; but dared not for fear of maintenance, and therefore this word (*manutenet*) true, quære. Br. Champerty, pl. 2. cites 47 E. 3. 9.—Brook says it seems that the writ is not good *adhuc manutenet*; for when *the appeal was determined by judgment*, he cannot any longer maintain this plea; for now it is no plea. Br. Maintenance, pl. 14.—*But* if the writ of maintenance be brought pending the first writ, there he may say *quod adhuc manutenet*. Ibid.—*But* if it be brought after judgment in the first plea, then it shall be *quod manutenuit*, but note the diversity. Ibid.

12. *Bill of maintenance* by W. against J. who was present in Court, because he *maintained in the presence of the justices* one H. in a suit between the plaintiff and H. Moile prayed judgment of the bill; for he *does not say that presens est in curia*; Newton said, the bill * does not mention that he was present and maintained, but (is only) *that, sedente curia, he maintained*, and this appears by the bill; Brown said, that in the *replication express mention* shall be made of his appearance, which Paston agreed. Per Port. In bill of maintenance against an attorney, he shall make mention of the appearance of the attorney, and yet they are always intended to be attending at the Court; and because this bill was of maintenance *sedente curia* it shall be intended that they have appeared; for otherwise he could not maintain *sedente curia*; and after the bill was awarded good, quod nota; and it seems there, that if the maintenance had not been done *sedente curia*, the plaintiff would have been put to his original writ of maintenance, and should not have bill thereof. Br. Bille, pl. 10. cites 22 H. 6. 24.

* Orig.
(Prise de ceo
que &c.)

If the defendant in maintenance be charged with

13. *That which ought to be justified, ought to be a maintenance justifiable, but if it be not any maintenance, then the general issue suffices.* Br. Maintenance, pl. 17. cites 22 H. 6. 35.

a special point of maintenance, he must answer to the same, and the general issue then shall be no plea for him. Heath's Max. 82.

If the defendant justifies at another * day and another place in the same county,

14. A man alleged the maintenance the Monday next after the feast of Saint John, and the defendant justified the Monday before the feast of Saint John, and traversed all maintenances after, and well per Fortescue Justice, quod non negatur. Br. Traverse per &c. pl. 19. cites 28 H. 6. 6.

this is good without traverse; for it is not local, but may continue. Br. Traverse, per &c. pl. 87. cites 21 H. 6. 15.—* S. P. so that it be before the date of the writ per tot. Cur. Br. Maintenance, pl. 14. cites S. C.

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15. Note, that a man may join general maintenance, and special maintenance in one and the same writ, and well. Br. Maintenance, pl. 52. cites 31 H. 6. 9.

16. Main.

16. Maintenance was, *that S. quendam querelam loquela quæ fuit in curia nostra coram justiciariis nostris de Banco inter &c.* Judgment of the writ; for he has not shewn in what place the plea was held; for it shall be at Westminster; Prisot said, if it was in Banco Regis which is removeable, yet when the plea is passed he shall shew where the Court then was; Danby thought that the writ was good; for it shall be intended to be at Westminster. Br. Brief, pl. 527. cites 34 H. 6. 27.

A man may bring maintenance of W. N. against the plaintiff in a quarrel in C. B. without shewing where C. B.

then was; per Needham, Danby and Asheton; but per Davers and Prisot contra, that he ought to say at Westminster, or other place. Br. Pleadings, pl. 52. cites 36 H. 6. 12.—Maintenance, the writ was that the defendant maintained a certain quarrel between R. W. and the plaintiff which is yet pending in the King's Bench, and did not shew where the King's Bench then was, and therefore the writ was abated. Br. Brief, pl. 25. cites 27 H. 6. 10. —Exception was taken for such cause, and it was held fatal. Vent. 302. Mich. 28 Car. 2. B. R. the King v. Humphreys.

17. In maintenance *nul tiel record* is a good plea for the defendant; per Davers and Prisot J. quod non ibi negatur; quod nota. Br. Maintenance, pl. 25. cites 36 H. 6. 12.

1 Hawk. Pl. C. 55. cap. 83. l. 39.

18. Maintenance on *quadam querela* which was between A. and this plaintiff pro parte A. &c. where the plea yet pends; judgment of the writ, & non allocatur, but the defendant awarded to answer. Br. Maintenance, pl. 21. cites 37 H. 6. 25.

19. In maintenance, per Markham for law, he who is retained with J. N. to ride with him to London, cannot aid him in his plea in London or Westminster, for this is out of his retainer, contra where he is retained with him * by the day to do all manner of services, there this is a good plea without shewing how he maintained in special, because it is lawful for him to maintain in omnibus. Br. Maintenance, pl. 27. cites 39 H. 6. 5. 6.

As where a man justifies as brother, cousin &c. he need not shew how he maintained him; for he may maintain in

all things, as to ride with him, or to be with him at the bar, and to proffer to the men of law for him. Ibid.—So of a servant. Ibid.—Contra of special retainer * from day to day to be his servant, there he cannot meddle beyond his retainer. Ibid.—The defendant justified, because the party for whom &c. was his servant, and he retained J. M. learned in the law to be of his counsel, and did not say if he retained de propriis, or with the money of the servant's wages, and yet a good bar by award; for it shall be intended of the servant's money. Br. Maintenance, pl. 44. cites 31 H. 6. 9.—

* Journalment.

20. Maintenance because the defendant *manutenuit in an action* between the plaintiff and J. N. pro parte T. P. It is a good plea that the action was between the plaintiff and T. P. and J. S. absque hoc, that there was such action as the plaintiff supposed, judgment of the writ. Br. Maintenance, pl. 47. cites 6 E. 4. 4. 5.

21. In maintenance the defendant said that he was one of the jurors who was sworn upon the issue in the first action, in which he supposed the maintenance, judgment si actio; per Pigot, you ought to say that you gave the verdict for the notice which you had of the truth in the matter; but per Cur. the plea is good as before without it; per Jenney, after the verdict given, you prayed judgment for the plaintiff of the steward in the first action, by which he gave judgment accordingly, of which the action is brought and by some of the justices, this prayer of judgment is maintenance, quod

quod Littleton concessit. Br. Maintenance, pl. 45. cites 18 E. 4. 1 & 2.

S. C. Pl. C. 73. b. but Coke J. ibid. 87.

b. thought there was no necessity of averring that it was a pretended

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right.—

* S. P. but he need not recite it, because the Judges are bound ex officio to take notice of it, being of a publick nature; but if he do recite it, he must, at his peril, take care to recite it certainly, because it is the ground of the action; and the Court will not aid him by intending that

there is another statute to maintain his action, different from that whereon he himself hath founded it. 1 Hawk. Pl. C. 264. cap. 86. S. 8.—† S. P. because that is the point of the action. 1 Hawk. Pl. C. 264. cap. 86. f. 10.—‡ S. P. that it is not necessary to set it forth. 1 Hawk. Pl. C. 264. cap. 86. f. 13.—S. C. cited Arg. and says that this point was held well enough notwithstanding that the lease was not to be forfeited, but was a conveyance to the point of forfeiture, viz. the value of the lands. 2 Lc. 59.

22. In debt upon this statute for 80l. the count was, *that such a day and year (but did not shew certainly that it was within a year before the action brought) unum mesuagium &c. in M. in Com. G. de valore octogin. librarum apud M. predict. barganizaverunt, concesserunt & ad firmam dimiserunt ad terminum annorum of which said tenements they the said defendants, nor any of their ancestors, nor those by whom the said defendants claim the same tenements were in possession of the same, nor of the reversion or remainder thereof, nor took the rents or profits of the same by the space of one whole year next before the aforesaid bargain, grant or demise thereof made per quod actio accrevit &c.* The defendants demurred upon the declaration, and whether this lease for years be within the statute was the question; three exceptions were taken, 1st, That the *statute* was misrecited as made 28. Apr. 32 H. 8. where it was otherwise &c. 2d, That there ought to be an *† averment that the lessors had a pretended right or title*, by reason of the words of the statute. 3d. Because it was said *ad terminum annorum*, *† without shewing certainty or commencement &c.* and the Court held the two first exceptions good, and that they ought necessarily to be alleged, but as to the last they all but Coke J. held otherwise, because the number of years here is not material; and also, the plaintiff is a stranger to it, and therefore cannot have notice of the contract. But for the matter they were clearly of opinion that the pretended title of a term is within the purview and intent of the statute; another exception was taken to the *double-ness of the count, viz. barganizaverunt & concesserunt* whereas either of those terms were sufficient, and this by two justices. D. 74. b. pl. 19. Mich. 6 E. 6. Partridge v. Strange.

23. The information must set forth that the defendant, nor any of his ancestors, or any by whom he claimed have taken the profits, and though it be laid that the plaintiff himself has been in possession of the land by 20 years before the buying of the pretended title, it is not sufficient; for it is but matter of argument, and not any express allegation; for in all penal statutes the plaintiff ought to pursue the very words of the statute. Le. 208. Mich. 32 & 33 Eliz. C. B. Lancaster's Case.

24. In assumpsit the plaintiff counted, that whereas he claimed to have title to certain lands in D. the defendant in consideration that the plaintiff assumed to assign his right, title, and interest to the defendant, he promised to pay him 40l. &c. After verdict it was moved in arrest of judgment, that this was an unlawful consideration, and against the statute 32 H. 8. because it appears not that

that the plaintiff was in possession by the space of a year before; so that he could assign to the defendant, nor that the defendant was in possession that he might release to him; sed non allocatur; for it stands indifferent, whether he was in possession or not, and a declaration shall not be avoided but for great cause, and the plaintiff had judgment. Cro. E. 151. Mich. 31 & 32 Eliz. B. R. Dobbins's Case.

25. Error was brought upon a judgment in debt upon the statute 32 H. 8. because the plaintiff demanded 50l. for the value of the land, and the jury find the value 20l. upon which the plaintiff had judgment to recover one moiety, and the queen the other moiety, and no judgment was for the residue of the 50l. viz. that the plaintiff sit in misericordia pro falso clamore suo: and for this cause the judgment was reversed; though in trespass or other actions in which the plaintiff counts ad damnum if less be found than he declares for, yet he shall not be amerced, because the action is grounded upon an uncertainty. Cro. E. 257. pl. 34. Mich. 33 & 34 Eliz. Savery v. Tey.

26. A. informed against B. and shewed that M. was, and yet is, seised of lands, and had taken the profits for two years before, and that B. pretending title by indenture, sold his pretended title to A. aforesaid for a certain sum of money &c. and averred that B. had not possession, reversion, or remainder, or took the profits for a year before; and averred, that he (viz. A. the plaintiff) knew it not to be a pretended title; and averred also, the * value of the land &c. Upon not guilty the jury found for the plaintiff. It was moved in arrest of judgment, 1st, that the penalty in the statute shews what manner of contract or bargain the statute intended; for it is to forfeit the value of the lands &c. so bought &c. so that to make a forfeiture there, ought to be contract, or covenant, or bargain for the lands themselves, and here the title is bought, and not the land; and the meaning of the statute was, if the land was sold &c. and the mischief the statute intended to meet withal was the conveyance of title to another, and this cannot be but when the land itself is sold, and cited new entries, 19, 20 Eliz. Information 365. and said, that all the cases in Co. Litt. 369. are of the land itself. 2. That the * information is by A. (the purchaser) who is particeps criminis, and that his averment, that he had no notice of its being a pretended title is void and idle, and that he ought only to aver that the other had not possession; for this is a matter of fact, but the other is matter of law. 3. If A. had bought the land itself, he might have averred that he knew not the title to be pretended &c. but when he says he bought the pretended title, eo nomine it appears now that he knew it to be pretended; and then his averment is repugnant; and then if the averment is void, it appears that the plaintiff is particeps criminis, and it was not the meaning of the general words of the statute, which says (to the party that will sue for the same) to give action to the offender, and to elude the statute by his bringing information, and permitting the land to be undervalued,

It was alleged, that the defendant, not being seised of such tenements, nor having a reversion or remainder therein, conveyed and [176] granted the 31 Oct. 4. Car. such tenements by way of maintenance and champerty to W. R. and for confirmation of the said conveyance, the defendant and his wife by fine, Hil. 4 Car. granted them to W. R. and does not aver in fact to that it is a pretended right &c. as he ought to do. Held ill. Cro. C. 232. the King and

and Barnes
v. Hill and
Windsor.—

* It is not
sufficient to
set forth the
value of the
land at the
time of the
conveyance

executed, without shewing the value at the time of the bargain; because the forfeiture is governed by the later. 1 Hawk. Pl. C. 264. cap. 86. s. 11.—† 1 Hawk. Pl. C. 264. cap. 86. s. 9.

valued, and bar all others by his information; but it was argued e contra, that the words of the statute are pursued, viz. *obtain, get &c. any pretended right or title &c.* and to that purpose cited D. 23. WORSIE's Case. And book of entries, tit. Debt. And that the averment, that he knew not &c. is not necessary, but only to prevent information against himself. Adjournatur. Litt. R. 369. Pasch. 7 Car. C. B. Withering v. Bancroft.

27. After verdict for the plaintiff in an information on that part of the statute 32 H. 8. which gives a forfeiture of the value of the land purchased, unless the seller was in *possession within a year before the sale*, it was moved in arrest of judgment, because the information had set forth the right of these lands purchased to be in J. S. and that the son of J. N. had conveyed them by general words, as descending from his father; which title of the son the defendant bought; whereas, if in truth the title was in J. S. then nothing descended from the father to the son, and so the defendant bought nothing; sed non allocatur; for if such construction should be allowed, there could be no buying of a pretended title within the statute, unless it was a good title; but when it is said, as here, that the defendant entered and claimed colore of that grant or conveyance, which was void, yet it is within the statute, so the plaintiff had his judgment. 2 Mod. 67. Hill. 27 & 28 Car. 2. C. B. Goodwin qui tam &c. v. Butcher.

[177] 28. To a *plea* by defendant on 32 H. 8. 2. of maintenance, the plaintiff replied, that defendants, or some of them, or some other person under whom they claim, or *some other person by their consent and agreement*, or to the use of the said defendants, or the plaintiff, or some or one of them was, or were in possession of the premises, or the reversion, or remainder thereof, or of some other sufficient estate, or had taken the rents and profits thereof by the space of one year before the making the articles for the purchase; the defendant demurs, for that the replication is a departure from the matter in the bill in saying some other person to the use of the defendant or the plaintiff by their consent was, or were in possession of the premises, and took the rents &c. for one whole year before the making the said articles; which, as the defendant's counsel alleged, exceeded the charge in the bill. But the Court held the replication good and pertinent, and over-ruled the demurrer. Mich. 31 Car. 2. Fin. R. 426. Cock v. Arnold & al.

(U) Punishable; How, by Actions or Indictments &c.

See (B. 2.)
(E.)—Ut-
lawry.

1. 1 E. 3. *Parl. Enacts*, That none shall maintain quarrels and parties in the country to the let and disturbance of the common law.

Maintenance of a suit in a Court Baron is as much within the purview of these statutes as maintenance in a Court of Record.

2. By 20 E. 3. cap. 4. None shall maintain any quarrels, save their own, on pain to have their body, lands, and goods to be at the king's pleasure.

1 Hawk. Pl. C. 255. cap. 83. f. 38.—He who barely assists another in taking out an original, which never is returned, is not liable to any action brought on these statutes, Ibid. f. 39.—It is not material, whether the plaintiff in an action on the said statutes was nonsuited, or recovered in the action wherein the maintenance is supposed. Ibid. f. 40.—Also it is certain, that he who fears that another will maintain his adversary, may, by way of prevention, have an original writ grounded on the said statute prohibiting him so to do. Ibid. f. 41.

3. By 4 Ed. 3. 11. Justices of the benches of assise, and of nisi prius, shall have power to hear and determine maintenance, conspiracy, confederacy and champerty, as well as justices in eyre, and that which cannot be determined before the justices of either bench upon the nisi prius, shall be adjourned unto the bench where they are justices, and shall be there determined. Note, that this statute is confirmed by the statute of 7 R. 2. 15.

4. By 20 Ed. 3. 6. Justices of assise have power to enquire of the misdemeanors of sheriffs, escheators, bailiffs, and other ministers, imbracers, and jurors, and to punish such as be found guilty; and the chancellor and treasurer are to hear all complaints thereof, and to apply speedy remedy thereunto.

5. A man was indicted of champerty, and put to answer to it. Br. Indictment, pl. 48. cites 44 E. 3. 38.

6. 1 R. 2. cap. 4. enacts, That no great officer of the king shall maintain quarrels in the country on pain of a fine to be imposed by the king and his council; and no other person on pain of imprisonment, and to be fined at the king's will; and if he be the king's officer or household servant, he shall also lose his office.

7. 31 El. cap. 5. f. 4. provides, That this act shall not extend to the laying any offence concerning champerty, buying of titles &c. where the penalty shall be to the value of 20l.

8. An indictment was upon the statute of maintenance, and one only found guilty; and it was moved in arrest of judgment, that seeing but one was found guilty, it did not maintain the indictment. 2 Roll. 81. Several were indicted for using of a trade, and said uterque eor' usus fuit, and held not good; sed non allocatur; for that in that case in Roll. the using of the trade by one cannot be an using by the other. But this is an offence that two may join in, or it may be several as in a trespass. Vent. 302. the King v. Humphreys.

9. All offenders are not only liable to an action of maintenance at the suit of the party grieved, wherein they shall render such damages as shall be answerable to the injury done to the plaintiff, but also that they may be indicted as offenders against public justice, and adjudged thereupon to such *fine and imprisonment*, as shall be agreeable to the circumstances of the offence; also it seems that a Court of Record may commit a man for an act of maintenance done in the face of the Court. 1 Hawk. Pl. C. 255. cap. 83. f. 36.

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(W) Judgment.

1. **M**Aintenance against two; the one said, that he was attorney of the party, and by command of his master retained J. N. of counsel with the party, and gave to him 40d. of the money of his master, which is the same maintenance &c. *Quære* if attorney may not retain counsel without command of his client, and if he cannot get money of his own for the time &c. and the other pleaded not guilty, and to the first the plaintiff said, that the attorney gave 6s. 8d. of his own to one of the jury, and upon this they were at issue, and found that the one had given the 6s. 8d. prout &c. and that the other was guilty, and taxed damages jointly for all; and by the opinion of all the justices except Needham, because it is brought of joint maintenance, and in pleading the plaintiff confessed it was several maintenance, viz. special maintenance in the one, and general in the other, therefore the writ shall abate, and the jury ought to have severed their damages; for the plaintiff is more damnified by the one maintenance than by the other by presumption and intendment of reason. Br. Maintenance, pl. 26. 36 H. 6. 12.

Maintenance of Writs.

(A) *In what Cases the Plaintiff must or can maintain it.*

1. **D**OWER against 2 sisters, the one pleaded partition and detinue of evidences of her moiety, and the other pleaded such another plea; there the demandant was not compelled to maintain

tain his writ; because *the tenants did not plead this to the writ, but pleaded in bar*, and also non-constat, if the partition was made before the writ purchased, or pending the writ. Br. Maintenance de Brief, pl. 38. cites 21 E. 3. 8.

2. *Entry in the per by J. and E. his feme; he said, that the name of his feme is A. and not E. and demandant said, that she is known by the one and by the other & non allocatur, but was compelled to maintain his writ, that she is named E.* Br. Maintenance de Brief, pl. 27. cites 21 E. 3. 47, 48.

3. *As to matters in fact, triable by the jury, the jury shall be taken upon it, and the plaintiff need not maintain his writ.* Br. Maintenance de Brief, pl. 3. cites 40 E. 3. 28.

But per Finch where outlawry, excommunication &c.

are pleaded, which are not triable by the jury, the plaintiff shall maintain his writ. Ibid.

4. *But per Caund. if the defendant in assise says, that the plaintiff is covert baron, or has taken baron pending the writ, the plaintiff shall maintain her writ, quod Kirton concessit.* Ibid.

5. *Scire facias of tenements in C. the tenant pleaded jointenancy, by deed of the same tenements in S. which S. is a hamlet of C. and the demandant said, that S. is a vill by itself &c. and because he alleged jointenancy by deed in another vill, it was held, that the demandant may answer to the vill only without maintaining his writ.* Br. Maintenance, pl. 25. cites 41 E. 3. 25.

Otherwise it is, if he had pleaded jointenancy in the same vill; for he shall maintain his writ

alone, that sole tenant as the writ supposed. *Quære.* Ibid.

6. *Præcipe against two; at the grand cape, the one appeared and took the entire tenancy, absque hoc, that the other who made default had any thing, and tender'd his law of non-summmons; the demandant maintained his writ, that tenant as the writ supposed.* Br. Maintenance de Brief, pl. 5. cites 47 E. 3. 14.

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7. *Formedon against two, the one pleaded non-tenure, and the other disclaimed, and the opinion of the Court was, that the demandant may enter; but per Danby in action, in which the demandant may recover damages, he may aver the defendant to be tenant, and otherwise not, quod nota diversitatem inde, and so here the demandant need not maintain his writ.* Br. Maintenance de Brief, pl. 35. cites 36 H. 6. 28.

(A. 2) In what Cases. *Election*, in what Cases to maintain it or not.

1. **PRÆCIPE** quod reddat against two as jointenants, and each took on himself several tenancy, and pleaded in bar; the demandant ought to maintain his writ; per Newton. Br. Maintenance de Brief, pl. 13. cites 22 H. 6. 55.

2. *And if in præcipe quod reddat against two jointenants the one makes default after default, and the other appears and accepts the entire tenancy, and pleads in bar, or if the one says nothing, and his companion accepts the entire tenancy and pleads in bar, the demandant may accept him tenant and answer to the bar; but he may maintain his writ if he will; per Danby.* Ibid.

(A. 3) In what Cases. At what Time.

1. *PRÆCIPE* quod reddat against twelve; eleven appeared, and one made default, by which grand cape issued against him, and the eleven had *idem dies*, at which day, the one made default again, and one of the eleven who appeared before made default also, and the demandant would have maintained his writ, that all are tenants &c. and could not per Cur. unless all appear, or that the process be determined, and so it is not here; for petit cape is issued against one, and therefore per Cur. he shall attend the return of it; for he may come at the day and save his default, and accept the entire tenancy. Br. Maintenance de Brief, pl. 26. cites 3 H. 6. 52.

(B) In what Cases. How and what is sufficient Maintenance.

1. *ASSISE* against several of 10l. rent; one said, that where it is brought against P. as tenant of the rent, one M. is tenant and perneur of the rent not named in the writ, judgment of the writ and if &c. and the plaintiff prayed the assise; and per Cur. the plaintiff shall maintain the writ specially, and shall not pray the assise generally, by which he said, that P. is tenant of the land and deforceor of the rent, absque hoc that M. is tenant, and the other said, that M. was tenant of the rent, Prist, quod nota. Br. Maintenance de Brief, pl. 19. cites 30 Aff. 5.

[180] 2. *Præcipe* quod reddat against lord and villein, or mortgagee and mortgagor; and the villein or mortgagee pleads sole tenancy to the writ; the demandant may maintain his writ by the special matter; for otherwise, if the lord or mortgagor enters pending the writ, it shall abate the writ. Br. Maintenance de Brief, pl. 4. cites 41 E. 3. 16.

3. Writ by several *præcipes* against two; the one said, that the land in the one *præcipe* is the same land that is in the other *præcipe*, and of this pleaded jointenancy with the other, and the other said the like, and pleaded jointenancy with the first, and the demandant said *protestando*, that it is not all one land but diverse & *pro placita*, that the one was sole tenant the day of the writ purchased of the one land, and the other the like of the other land, and good maintenance of the writ by judgment, and the plea of the tenants is not double; for the first matter, that the one land and the other is one and the same land is void; for a man may have action against two by several *præcipes* or action *simul & semel*; for he cannot recover but una vice, and he who has not this may disclaim, or plead non-tenure. Br. Maintenance de Brief, pl. 30. cites 4 H. 6. 14, 15.

(C) In

(C) In what Cases. How. *Where jointenancy or Sole Tenancy is pleaded, or one makes Default, or pleads Non-tenure.*

1. *PRÆCIPE* quod reddat against two, the one took the entire tenancy and vouched, and the other did the like separately, and it was held, that the demandant ought to maintain in his writ. Br. Maintenance de Brief, pl. 24. cites 41 E. 3. 21.

2. In *scire facias*, the tenant pleaded non-tenure of parcel, and shewed who is other tenant, as he ought; and the plaintiff was compelled to maintain the writ, that sole tenant as the writ supposed, absque hoc, that the other had any thing. Br. Maintenance de Brief, pl. 6. cites * 12 H. 6. 16.

* It should be 11 H. 4. 16. pl. 35.

3. Entry in the quibus; per Cur. if there are two partners, and the one appears at the grand cape and pleads jointenancy with a stranger, and wages his law of non-summons, and the demandant says, that he was seised till by those two named in the writ disseised, and averred that those two took the profits, and that he had brought his action within the year according to the statute, and the other said that he did not disseise him, *Prist*; if this issue be found against the demandant, the judgment shall not be other, but that the writ shall abate. Br. Maintenance de Brief, pl. 16. cites 14 H. 6. 3.

Otherwise it is where the writ is brought against 3, and the one appears always, and the other comes at the grand cape, and the 3d. makes de-

fault after default; for there he shall count because one always appeared, but in the other case he shall not count. Ibid.

4. Where a man pleads a jointenancy with a stranger &c. the maintenance is, that sole tenant as the writ supposed, *Prist*, absque hoc that the stranger had any thing. Br. Maintenance de Brief, pl. 9. cites 19 H. 6. 12, 13.

S. P. Br. Traverse per &c. pl. 70. cites 19 H. 6. 13. per Newton.

5. But in *præcipe* against two if the one takes the entire tenancy upon him, absque hoc that the other has any thing, and vouches or pleads in bar as he ought, there the maintenance of the writ is, that sole tenant as the writ supposes; for where the tenant takes traverse in his plea, the demandant shall not take traverse, and if he does not take traverse in his plea, the demandant shall take traverse in his replication. Ibid.

S. P. Br. Traverse per &c. pl. 70. cites S. C. per Newton and Fulthorp.

6. In trespass the defendant said, that the plaintiff had nothing in the land where &c. but in common & pro indiviso with A. B. who is alive not named in the writ, judgment of the writ; and the plaintiff maintained that it was his several soil, absque hoc that A. B. had any thing, and so ad patriam &c. Br. Maintenance de Brief, pl. 10. cites 22 H. 6. 12.

7. Dower against R. and S.—R. pleaded non-tenure generally, and S. took the entire tenancy and pleaded in bar; Bingham, as to R. maintained the writ, and as to S. that he is jointenant with R.

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and to the plea pleaded by him alone, no law ought to put him to answer; per Port this is dangerous for you, for one jointenant may lose his portion; Bingham said if *R. had disclaimed*, then *S.* had mispleaded, but here the plea is good; quod fuit concessum. Br. Maintenance de Brief, pl. 12. cites 22 H. 6. 44.

Otherwise it is if *F.* makes default and *P.* accepts the intire tenancy,

8. And if I bring *formedon* again *F.* and *P.* and *F.* pleads non-tenure generally, and *P.* accepts the intire tenancy and pleads in bar, I shall not be resceived to maintain the writ, for I am at no mischief; per Newton. Ibid.

quere thereof; for it seems that it is all one. Ibid.—For per June 8 H. 6. fol. 13. in *præcipe* quod reddat against two, if one appears and says nothing or makes default, and the other takes the intire tenancy, and pleads in bar, the demandant may answer to the bar without maintenance of his writ; but after June changed his opinion in the first case, which was of land alleged in two vills which was only in one, and therefore quere. Ibid.—But if the demandant confesses that the one has nothing, there his writ shall abate; for there is a great diversity between confession and not denying as here, quod nota bene. Ibid.

But note, that if the other had taken the tenancy like-wise and had vouched or pleaded, there the demandant

ought to have maintained his writ; quod nota diversity elsewhere often. Ibid.—* So it is in all the editions of Brook but should be 37 H. 6. 16. b. pl. 1.

9. Formedon against two; the one said nothing, the other took the intire tenancy, absque hoc that the other had nothing and vouched to warranty, and the demandant counter-pleaded, and the tenant imparled, and at another day answered without the voucher, and so see that the demandant was not compelled to maintain his writ; for if the one be tenant it suffices as it is said there, quod nota. Br. Maintenance de Brief, pl. 15. cites * 57 H. 6. 16.

10. In trespass the defendant said that the plaintiff had nothing in the land the day of the writ but in common pro indiviso with *J.* not named, judgment of the writ, and shewed by descent to the plaintiff and another, which other enfeofed *J.* of his part; and per Cur. it is good maintenance of the writ; that sole seised absque hoc that the other had any thing, and need not traverse the special matter; for it is only conveyance. Br. Maintenance de Brief, pl. 33. cites 1 E. 4. 7.—So of other tenancy in common. Ibid.

S. P. Br. Traverse per &c. pl. 130. cites S. C.

11. Formedon against the baron and feme; the baron pleaded non-tenure for his feme, and for himself took the intire tenancy absque hoc, that the feme had any thing, and vouched; the demandant said that the baron and feme were tenants as the writ supposed the day of the writ purchased, & hoc paratus &c. and to the voucher made by the manner, no law shall put him to answer; per Danby, you should say absque hoc that the baron was tenant of the whole preut &c. Per Catelby, no; for the baron has taken traverse, and where the one party traverses, the other who rejoyns to him shall not traverse also; but it suffices to maintain the writ. Br. Maintenance de Brief, pl. 14. cites 9 E. 4. 36.

As where he pleads non-tenure, it

12. When the tenant pleads in the negative it suffices for the demandant to answer in the affirmative. Ibid. per Pigot.

suffices for the other to say, that tenant the day of the writ purchased, Prift. Ibid.—And in *præcipe* quod reddat against two, the one took the intire tenancy and pleaded in bar, and the other did

the like; it suffices for the demandant to say, that tenants as the writ supposed; for every one took the intire tenancy. Ibid.—Contra to the writ. Ibid.—The same law, where one takes the intire tenancy, and the other pleads non-tenure. Ibid.—Contra of jointenancy; for there the demandant must say that sole tenant absque hoc, that the other had any thing, for there the tenant pleads in the affirmative. So per Littleton in assise against several, the one took the intire tenancy and pleaded in bar, the plaintiff may say that he held jointly with the other named in the writ, and to the plea pleaded by the manner &c. and shall not take traverse absque hoc that he who pleaded is sole tenant. Ibid.

13. Upon non-tenure pleaded the maintenance of the writ is that the defendant is tenant as the writ supposed, and de hoc ponit se super patriam &c. and the other the like, and no absque hoc shall be there. Br. Maintenance de Brief, pl. 42. cites Book of Entries. But upon jointenancy pleaded the demandant shall say that the defendant is sole

tenant as the writ supposes, absque hoc that the other has any thing &c. quod vide diversity. Ibid.—For in this last case the defendant pleaded in the affirmative, therefore the demandant ought to answer with a negative; but in the other case, the defendant pleaded in the negative, therefore an affirmative by demandant makes it to be a perfect issue, and there it suffices for the defendant to say & ipse similiter, without more. Ibid. [182]

14. Writ of entry against A. and B.—B. took the intire tenancy, and said that he did not disseise the demandant absque hoc, that A. had any thing; and A. took the intire tenancy absque hoc that B. had any thing, and traversed the disseisin and the demandant said that they are tenants as the writ supposed; Prist. Br. Maintenance de Brief, pl. 45. cites 13 Il. 7. 26.

15. Formedon was brought by A. against B, C. and D.—B. and C. appeared by one attorney, and D. by another attorney, and B. and C. confessed the action; D. said that at the day of the writ purchased he held jointly with B. absque hoc, that C. any thing had in the land the day of the writ purchased; and as to his moiety of the tenements he vouched a stranger. The demandant maintained his writ, viz. that the three were jointenants as to the writ supposed, & hoc petit quod inquiratur per patriam, & prædict. D. similiter; and this was held good pleading and good issue, per Cur. and the demandant cannot pray judgment for any part till the issue be tried. D. 6. pl. 4. Mich. 26 H. 8. Clotworthy v. Kingsland & al.

16. A. and B. were seised to the use of baron and feme before the statute 27 H. 8. cap. 10. after which a writ of entry in the post was brought against the baron, and he pleaded jointenancy with his feme; and the question was, whether he ought to mention the statute; and the Court thought that he ought to shew it; for at the common law, when the tenant pleads jointenancy with a stranger, he ought to shew of whose feoffment. It was further moved, whether the demandant might aver the baron pernor of the profits only; and the Court held that all pernanacy of the profits is clearly taken away by the statute, quære. D. 32. a. pl. 3. 4. Pasch. 28, 29 H. 8. Anon.

17. Entry in the quibus in the nature of assise against A. and B.—A. pleaded non-tenure in abatement B. took the intire tenancy upon him and pleaded in bar the feoffment of J. S. and J. N.

to him in fee; the demandant, as to the plea of *A.* in abatement of the writ, averred him and *B.* tenants of the franktenement as the writ supposed; and issue thereupon joined, and as to the plea of *B.* he said, that his father was seised in fee, till by the said feoffors disseised, who being so in by disseisin enfeoffed *B.* ut supra, and that after his father died, and he as son and heir entred and was seised in fee as in his remitter till by *A.* and *B.* disseised &c. and did not aver *Et hoc paratus est verificare* &c. *B.* rejoined and traversed the disseisin by the said feoffors to the father of the demandant upon which point they were at issue; and at the day that the inquest appeared, the demandant would have relinquished his first issue; because it was joined unnecessarily, he not being bound to maintain his writ, but might have demurred upon the plea of nontenure of the one, and answered to the bar of the other; but this the Court would not permit; and upon the evidence to prove jointenancy it appeared that *A.* before the entry of the demandant was termor or lessee at will to *B.* and paid him rent, and that he re-entred upon the demandant claiming his former estate, and by the opinion of the Court, they were disseisors and tenants; because the termor could not qualify his own wrong, &c. and it was found for the plaintiff in both issues &c. and judgment given accordingly. D. 134. b. pl. 11. Mich. 3 & 4 P. & M. Kirton v. Birling.

[183] 18. Formedon by *F.* of the manor of *S.* with appurtenances. The tenant, as to one moiety, vouched *C.* as son and heir of *B.* son and heir of *A.* &c. as of full age, to be summoned immediately &c. And as to the other moiety, (except the moiety of 7 houses &c.) he pleaded a fine executed with proclamations, (except pre-exceptis) and 5 years incurred, and non-claim in bar. And as to the moiety excepted, he pleaded jointenancy by fine with his feme, and demanded judgment of the writ &c. The demandant, as to the voucher, counterpleaded thus, viz. That the said *A.* the grandfather of the vouchee, nor any of the ancestors of the vouchee, whose heir he is, ever had any thing after the gift, and before the writ brought, unless jointly with *J. S.* and *J. N.* &c. with an averment of the continuance of this estate, during the life of the grandfather, and that the said *J. S.* and *J. N.* survived. And all the Court held the counterplea insufficient; because it does not extend to the seisin or possession of the vouchee himself; but if he had been vouched as within age, and that the parol ought to demur &c. then to counterplead the seisin of the ancestors &c. according to 21 E. 3. fo. 10. is sufficient. And to the plea in bar the demandant took exception, quod partes ad finem nihil inde tempore &c. habuerunt &c. but that a stranger was thereof seised in fee; which exception the Court held good enough. And as to the plea in abatement of the writ, he affirmed the writ, and traversed the jointenancy, upon which they were at issue &c. It was argued, that jointenancy by fine pleaded shall abate the writ immediately, if the demandant cannot confess and avoid it; for against a fine levied, which is matter of record, he shall not have

have direct averment, that he is sole tenant. But per tot Cur. *jointenancy of parcel shall not abate the whole writ*, but for the residue it shall stand; and *though the demand be of an entire thing*, as here, yet *otherwise it is of non-tenure of parcel of an entire demand*, because there the writ ought to have a foreprise; contra of jointenancy. And it was holden that because *jointenancy was pleaded in abatement of the writ after voucher and bar pleaded*, which affirms the writ good, it *was preposterous*, and therefore the Court ought not to regard it &c. D. 290. a. &c. pl. 62. &c. Trin. 12 Eliz. Fitzwilliams v. Copley.

(D) In what Cases. How. *As to what Part.*

1. **D**E B T against J. S. of D. in the county of M. yeoman, late of A. the defendant shall answer to both the vills, but the plaintiff shall maintain but one only. Br. Maintenance de Brief, pl. 29. cites 19 H. 6. 66.

Major Part.

(A) Major Part. What Act of theirs shall bind the Rest.

1. **I**F the mayor and greater number *do an act* it shall bind all; because *ubi major pars ibi tota*. Per Brian Ch. J. Br. Corporation, pl. 63. cites 21 E. 4. 7. 12. 27. 67.

2. The major part of a town, that had *right of turbary* agreed upon a *method to prevent the little tenants from selling*; and held, that the same shall bind such as did not assent. For *ubi major parts ibi totum*. 3 Le. 265. Arg. in the Chamberlain of London's Case. cites 15 H. 7. 21 H. 7. 40. 8 E. 2. tit. Assise 413. Per Gawdy J. every one ought to assent, and cites 44 E. 3. 19. and per Wray Ch. J. There the ordinance was made to charge the inheritance, but in the principal case, it is only to charge their goods, wherefore the assent of the greater part is sufficient, and a procedendo was granted. Ibid. In the Chamberlain of London's Case.

3. *Bills of conformity* have been long since exploded, and there is no such equity now in this Court; per Ld. North K. Pasch. 1683. Vern. R. 153. in Alderman Backwell's Case. [184] Fin. R. 332. Mich. 29 Car. 2. Davis v. Degelder.

4. Where the major part of the *part owners of a ship* settle and agree an account of the profits of a voyage, it shall *conclude* the rest; and the plaintiff ordered to pay costs, per Jefferies C. Trin. 1687. Vern. R. 465. Robinson v. Thompson.

Per Holt Ch. J. 'The Admiralty have no co-nusance of this matter.

5. The majority of the *part owners of a ship* may *send her out* without consent of the rest, but are answerable for all hazards, and liable in case of profit to those that do not consent; per Holt Ch. J. Show. 13. Knight v. Parry.

But he held, that an action lay for the major part for refusing to let the *ship go a voyage*, setting forth the custom and the special matter, and declaring *ad damnum &c.* Carth. 27. KNIGHT v. BERRY. Pasch. 1 W. & M. B. R. —A dissenting owner will not be liable, for he hath not the benefit of the voyage, per Holt-Ch. J. Show. 30. in Case of Boson v. Sandford. —If some do not agree, and the major part do, the others shall not have any advantage of the freight; per Holt Ch. J. Show. 104. S. C.—Trin. 32 Car. 2. 2 Chan. Cases 36. Anon. S. P.

6. Where the *common law creates a charge upon any precinct*, as to repair bridges, ways, churches &c. the common law gives them the method of answering the charge; otherwise where no charge is by law laid upon them, there a majority cannot *bind the rest*. 1 Salk. 362. Pasch. 1 Ann. B. R. The Case of Blackheath Hundred.

7. There is a great *diversity* between *abbot and convent*, and *master and fellows*, *mayor and commonalty*, &c. For in case of abbot and convent there must be the major part and the abbot besides; and the reason is, because the abbot only *acts cum consensu* of the major part of the rest; but in case of master and fellows &c. the master himself is but part of the acting part, and he is one of the grantors just as the rest. 12 Mod. 232. Mich. 10 W. 3. Anon.

8. The mayor, or any other officer of a corporation, hath of common right no *casting vote*; it is true such a thing may be either by prescription or charter; and if there is an equality of votes, and they cannot agree, they must be brought up in contempt, and be committed till they do agree, viz. till a majority do agree. Nels. Abr. 1155. pl. 13. cites Mod. Cases 152. The Queen v. Chapman.

Mandamus.

(A) Mandamus. *What it is &c. And in what Cases it lies.*

1. **T**H E plaintiff had a *verdict in ejectment*, and upon an agreement between the plaintiff and defendant, *the defendant was to hold the lands for the remainder of his term*; and according to that agreement he held it for 2 years; but *before the term expired, the plaintiff brought an habere facias possessionem, and executed it*; and now he moved for a rule for restitution. But Roll Ch. J. said it could not be, but he might have an action on the case against the plaintiff for not performing the agreement. Style 408. Hill. 1654. Wood v. Markham. Raym. 211. S. C.—
2 Lev. 18. S. C.
2. It lies *not for every taking away a man's freehold*, as in the case of a keeper of a park, or a * stewardship of a court baron; per Glyn Ch. J. Sty. 457. Trin. 1655. in Case of the Protector v. Craford.—* But see contra by Hale Ch. J. at (E) pl. 2. [185]
3. Mandamus does *not give any right, but only restores the party to his ancient right*. Sid. 286. Pasch. 18 Car. 2. B. R. Basset's Case.
4. Mandamus's do generally respect *matters of publick concern*; per Hale Ch. J. Mod. 84. in Appleford's Case.
5. The true *reason* of mandamus's was, when aldermen, capital burgessees, or such other officers, concerning the administration of justice, were kept out, to swear them into their places. But it is *rarely granted where one has any other remedy*; per Holt Ch. J. 12 Mod. 666. Hill. 13 W. 3. Anon.
6. Mandamus ought *not to go where the office is private, or the party may have an assize*. Per Holt Ch. J. 6 Mod. 18. Mich. 2 Annæ. B. R. in White's Case. S. P. admitted. Arg. and held accordingly by
Glyn Ch. J. Sty. 457. Trin. 1655. in Case of the Protector v. Craford.
7. Mandamus is *always to do some act in execution of law*, and not to be in nature of a writ de non molestando. 6 Mod. 229. Mich. 3 Annæ. B. R. Peat's Case. 2 Salk. 572. the Queen v. Peach.
8. Mandamus's are *founded upon Magna Charta cap. 29*. Arg. 10 Mod. 53. Mich. 10 Annæ B. R. in Sir Gilbert Heathcote's Case.
9. All mandamus's are *either to restore persons turn'd out, or to admit those refused*. Per Eyre J. 10 Mod. 54. in Sir Gilbert Heathcote's Case.
10. *Since the statute 9 Anna. 20. S.... a mandamus is in nature of*

of an action, special pleadings and replications being therein admitted, and costs given to either side that prevails, and error lies upon a judgment on special pleadings given therein, as was lately admitted in B. R. yet this was held to be *no supersedeas to the peremptory mandamus*, because such construction would quite defeat the end of the statute, and prevent the officer, who was chosen annually, from having any fruit of the mandamus; per Ld. Ch. J. Parker. And notice was taken by Ld. Ch. J. King, that the words of the statute were, that *in case judgment were given for the mandamus, a peremptory mandamus should be granted without delay*. Wms's Rep. 351. Pasch. 1717. in Canc. in Case of Dean and Chapter of Dublin v. Dowgatt.

11. A bill was brought in chancery by a *parson of one of the new churches* erected by the statute 3 Geo. 2. against the treasurer of the commissioners, for the dividend of 3000l. being the sum allotted for purchasing lands for the benefit of the rector of that church for the time being, and that such rector should be intitled to the *dividends of S. S. annuities* directed to be purchased in the mean time, to commence from *Midsummer, 1730*. The church was consecrated in January 1730, and the rector inducted in February 1730. The *treasurer paid him the dividend from Michaelmas 1730, but refused to pay the dividend from Midsummer before*. Lord Chancellor said, that it did not seem to have been the intention of the several acts made for building the 50 new churches, that disputes of this kind should be determined in the ordinary courts of justice, but only by the commissioners themselves, as it is in the acts relating to the *turnpikes*. But if this objection was out of the case, the natural court for the plaintiff to apply to is B. R. to grant a mandamus, and not to a court of equity to take an account. These acts have put this matter into a quite different method, by directing the money allotted for the building to be brought first into the exchequer, and from thence to be paid out into the hands of the treasurer, and when it is in his hands to be subject to the order of the commissioners. *If the commissioners do not do their duty, the proper court to apply to is to B. R. to grant a mandamus*. Barn. Chan. Rep. 377. March 10. 1740. Dr. Vernon v. Blackerby.

(B) In what Cases it lies for restoring Persons to Colleges and Schools.

1. A Mandamus was granted to restore one to an *usber of a free-school* where the *master and fellows of a college were visitors*; but upon arguing the legality thereof, Glyn Ch. J. doubted if it would lie; and he said, that by the same rule that a school-master should be restored, every scholar may claim to be restored; and he conceived that the visitors might remove the master of the school, if he do not observe the rules for government of the school, and it seemed as reasonable to turn him out,

S. P. that it lies per Glyn Ch. J. 2 Sid. 112. Mich. 1658. B. R. — 3. P. Sid. 169. in Middleton's Case. —

out, as it is to admit him into the place. Sty. 457. 1655. The S.P. Raym. 12. cited as Craford's

Cafe.—But it lies *not* for an usher of a school in Cambridge. Per Twifden J. who said it was so held anno 1655. Sid. 40. in Stamp's Cafe.

2. A mandamus was moved for to restore to the place of *one of the fellows of the college of physicians* in London and upon great debate it was granted; but on the return restitution was denied. Lev. 19. S. C.—2 Show. 173. Dr. Merrit's Cafe.—

Sid. 29. Hill. 12 Car. 2. B. R. Dr. Goddard's Cafe.

Tho' Holt

Ch. J. said it was used heretofore for swearing a physician of the college. 12 Mod. 666.

3. It lies not for a *fellow of a college* where there is a visitor. Mandamus was moved for to restore

Raym. 31. Mich. 13 Car. 2. B. R. Dr. Widrington's Cafe.

P. to his *fellowship of Lincoln College* in Oxford, being member of a lay corporation, and having a freehold in it; sed per Curiam it was denied, for the *visitor is the proper judge*; and when one takes a fellowship he submits to the laws of the founder, and the rules of the college; besides, a fellowship is a *thing of private design*, and doth not at all concern the publick. 3 Mod. 265. Mich. 1 W. & M. B. R. Parkinson's Cafe.—Comb. 143. S. C.—2 Show. 170. Alsop's Cafe.—S. P. Per Hale Ch. J. 1 Mod. 85. Appletoft's Cafe.

4. Mandamus to restore A. a *fellow of New College*; they return that the college was founded by &c. who made laws, that they should study so many years, and then take orders, and that the master and scholars for enormous crimes, scandalous and dangerous to the college may expel any fellow, and that the bishop of Winchester shall be visitor, and that all appeals shall be to him, and no other, that this fellow was expelled for an enormous crime scandalous and dangerous to the college, and being summoned, and convicted, and expelled, he had appealed to the visitor, who had confirmed the sentence; but adjudged that the writ would not lie, because *colleges are not spiritual foundations, but private societies*, like inns of court. Here the bishop is appointed visitor by the founder, and he hath given sentence, so this Court hath no jurisdiction; and this will cure all the faults in the return. 2 Lev. 14. Trin. 23 Car. 2. B. R. The King v. New College.

5. A mandamus was not granted to *restore a chaplain of a college* without appealing to the visitor. Carth. 168. Hill. 2 & 3 W. & M. B. R. Prohust's Cafe.

6. A mandamus was prayed to the vice-chancellor of Oxford to restore one usher to his *fellowship* of University College, who was expelled; and he having appealed to them as visitors, they refused his appeal; upon reading the statutes of the college Holt Ch. J. said, if they would have any mandamus at all, it must be directed to the vice-chancellor, master and scholars in convocation; Shower said, that the vice-chancellor and doctors in divinity, and proctors, are without doubt visitors of this college, and the vice-chancellor and proctors have three negative voices, and that if either refuse to accept this appeal, or to propose it to the convocation, it cannot be done. Holt said, that the

the question is only this, whether or no, if an *original visitor refuse to accept an appeal, or to do the party grieved justice* we shall compel him to it? And ordered that they be attended with the statutes of the college, and then they would consider of it. 5 Mod. 452. Mich. 11 W. 3. Usher's Case.

7. Mandamus was granted to restore Doctor Bently to his degrees of master of arts and doctor of divinity. 3 New. Abr. 532. cites Hill. 9 Geo. 1.

(B. 2) Returns Good. In such Cases.

Thereporter says, Nota, that though several of the college are lay, the corporation may be spiritual, and it cannot be shewn that this Court ever granted restitution to a monk or prior dative &c. and yet many monks were lay; for tho' they were votaries, yet they were not in orders.

Nota, the doctor was restored by the lords of the council, as cited in the Case of the King v. All Souls. Mich. 33 Car. 2. B. R. Ibid.

1. **M**andamus to restore Dr. W. to the fellowship of a college in Cambridge; the *return* was, *that such a person was founder*, who appointed a visitor, and made such laws &c. by which &c. without shewing for what cause they expelled him. It was objected, that the return was not good, nor could it bar B. R. of jurisdiction; and said, that what is said in KENN's Case, that they are the sole judges, has been denied; but it was said on the other side, that this gift and foundation was eleemosynary, sub modo that they obeyed their visitors, and if B. R. had a jurisdiction, they ought to come thither gradatim, viz. after appeal, and not per saltum, as here; adjudged, that the Dr. was well removed, and that B. R. could not restore him, and that they knew not that KENN's Case ever was denied; for whether the expulsion was right or wrong, they cannot judge thereof, because the visitor is fidei commissarius. Sid. 71. Mich. 13 & 14 Car. 2. B. R. Dr. Witherington's Case.

2. A writ of mandamus was directed *Johanni Goar præsidi, sociis & scholaribus Coll. Sti. Johannis Baptistæ, to which they put a return without signing it*; so that it does not appear to be the return of the college; It was insisted, that it ought to be signed by John Goar at least; for he is particularly named, and to this the Court inclined; for though it was admitted that they need not put their common seal to the return, yet he being particularly named, it is reasonable that he ought to subscribe the return. But it was said on the other side, that so it is in effect; for it is *indorsed* upon the return *Responsio Johannis Goar &c.* according to the direction of the writ, which the Court held sufficient; for the return being filed, they shall be *estopped* to say, this was not their return, it being made in their names; and if any other had made it for them, they might have their remedy by action upon the case. Skin. 368. 369. Mich. 5 W. & M. B. R. The King v. St. John's College in Cambridge.

3. The Court refused to grant a peremptory mandamus to the master of St. John's College &c. to remove A. B. C. &c. fellows

laws of the college for not taking of the oaths, *because* they were not made parties. Skin. 546. 549. Trin. 6 W. & M. B. R. The King v. St. John's College.

(C) Restoring to Corporations and Freedom.

[188]

1. **A**N Alderman of L. was removed, and S. chosen in his room. A mandamus was granted to restore him. And the return being insufficient, it was *ordered that* the new chosen alderman should be removed, and *S. be restored; but another alderman died* in the mean time, and then he who was removed *prayed to be restored to the place of alderman*; but adjudged, that he could not be restored to a new place by force of his former election; for by his removal he is now in statu quo prius, and so is no alderman, and therefore not to be restor'd to the place of an alderman. And a writ of restitution denied per tot. Cur. 2 Bulst. 122. Trin. 11 Jac. Shuttleworth v. City of Lincoln.

2. It lies for an * alderman, † common-councilman &c. Raym. * Skin. 293. 12. Pasch. 13 Car. 2. in Stamp's Case. Sir James Smith's

Case.—† Cumb. 214. Bret and Johnson's Case.—But see (C. 2)

3. It was granted to make one that had served an apprenticeship *free of a corporation*. Sid. 107. Hill. 14 & 15 Car. 2. B. R. Townsend v. the Mayor of Oxford.—Ibid. says such mandamus was granted. Mich. 32 Car. 2. B. R.

4. It was granted to restore an alderman of Canterbury to the *precedency of his place of alderman*, being removed. On the return thereof, divers exceptions were taken to it, and disallow'd; and after it was held good, and nothing farther done. 1 Lev. 119. Mich. 15 Car. 2. B. R. The King v. the City of Canterbury. S. P. Arg. 8. Mod. 28.

(C. 2) Returns. Good in what Cases.

1. **M**andamus to restore him to the place of an *alderman* was directed to the mayor and burgeses of Gloucester, who returned, *that their common council did consist of 30 burgeses, and that they had power to remove an alderman; and that they called him before 30 of them in domo concilii* to answer the matters objected against him for being a *common drunkard*, and because he did not give sufficient answers, they removed him, but did *not say* that a council was assembled *apud domum concilii*; and for this cause the return was held ill. Nelf. Abr. 1153. Mandamus (D) Pl. 1. cites 3 Bulst. 189. Taylor's Case.

2. Mandamus to restore B. to the office of an *alderman* in Northampton &c. the mayor returned the *letters patents of incorporation* anno 16 Car. *by which they had power to amove one for a* just Pasch. 28 Car. 2. B. R.

just cause, (viz.) that the mayor and such burgeses who had been mayors, might remove; and they return, that B. was removed per majorem & burgenses secundum chartam præd'. which might be by the mayor and such burgeses who had never been mayors; and to say secundum chartam, that is not good, without shewing a cause, and the manner of his removal, that the Court may judge whether they had pursued their authority. Nelf. Abr. 1153. Mandamus (D) pl. 4. cites 1 Vent. 19. Braithwaite's Case.

[189] 3. Upon a mandamus⁴ to the mayor &c. of Norwich to restore T. to the place of an *alderman* they return, (after divers clauses of their charter, and the act 13 Car. 2. cap. 1.) that he being *electèd the 16 Car. 2. took the oaths* in the said act willingly, and made the declaration there, and caused it to be registered, but did not subscribe it then, nor till May the 30th of the said king, before two justices of the peace of the said city. Exception was taken, that it does *not appear that he was required* to make the subscription, or that the declaration was tendered to him to be subscribed; but it was answered, that he ought to subscribe it at his peril; and that the proviso, which has a different penning from the other there, makes the office void, by the non-subscribing. And the reason was allowed by the Court. 2 Jones 121. Trin. 30 Car. 2. The King v. Thacker.

Pasch. 33.
Car. 2. B.R.

4. Mandamus was to the mayor, aldermen, &c. of Carlisle to restore Haddock to the place of *alderman* &c. There was a very long return, the substance was, That the city of *Carlisle was incorporated by the name of mayor and citizens* &c. time out of mind, and that there were always 12 *conciliarii alias aldermanni* of the said city, out of which number, a mayor was yearly chose[†] and 32 sufficient citizens, who together with the mayor and *conciliarii alias aldermanni*, were to be the common council &c. That King Charles the first did by letters patents 21 July 13 Car. incorporate the said city by the name of mayor, aldermen, bailiffs and citizens, and so sets forth the letters patents of incorporation, wherein there is a power given to the corporation to remove a mayor for ill government, or other reasonable cause, but no power to remove an alderman; then they return, that time out of mind to the time of the making the said letters patents, *quilibet conciliarius, alias aldermannus, was removeable for just cause*; that T. H. was chose alderman &c. and was removed for just cause, setting it forth, and therefore they could not restore him; and this return was held good; for though by the letters patents of Car. 1. the corporation had no power to remove an alderman; yet since, a *conciliarius alias aldermannus*, was anciently removeable for just cause, that power still remains; for the letters patents do not * abridge the corporation of any of their ancient privileges; if it should, it would be very prejudicial to most of the corporations in England, † who had been so time out of mind, but of late had surrendered, and taken new charters. Nelf. Abr. 1145. Mandamus (A) pl. 14. cites Raym. 437. Haddock's Case.

* Orig. merge or extinguish.
—† The orig. has only the words (ancient corporations) and says nothing of (time out of mind.)

5. Sir J. S. prayed a mandamus to be restored to the office of

an alderman of the city of London, suggesting that he was elected *secundum consuetudinem &c.* Upon which it was *returned*, that he was an alderman as is suggested; but *that he did not take the oaths* according to statute of 1 W. & M. by which his place became void; and adjudged, that notwithstanding the *franchises* of the city were *forfeited by the judgment in the quo warranto*, yet that the corporation remain'd in esse; and therefore, though that judgment was not reversed till the act of 2 W. & M. yet by the recital of the judgment in the act for restitution of the city of London, Sir J. S. *continued an alderman after the judgment in the quo warranto*, and was therefore obliged to take the oaths by the 1 W. & M. and they are to *intend the return to be true if possible*, and a peremptory mandamus was denied. Skin. 293. 310. Hill. 3 W. & M. B. R. Sir James Smith's Case.

6. Mandamus to restore him to the place of *alderman* of the city of E. The substance of the return was, That *recessit, elongavit & habitationem suam reliquit & deseruit &c.* and that several courts of common council were held, and that licet *summonitus*; he did not attend &c. for which he was removed &c. Three judges were of opinion, that this return was good, for that it is the duty of an alderman to be resident where he is chosen; that *deseruit & reliquit habitationem* must be *intended a total desertion*; and though he might return again, it is uncertain when; but *if he doth return, that will not purge the forfeiture* after a disfranchisement; but per Holt Ch. J. the return is ill, because there was *no particular summons* returned for the defendant to appear to answer what should be objected against him, and therefore they proceeded against him without hearing him, and by consequence the disfranchisement was against right and justice; this is the express resolution in JAMES BAGG's Case. It is true, the return is *licet summonitus* he did not appear, but that is *too general*, and he might not be prepared to answer the charge; therefore he *ought to be particularly summoned to answer a particular charge*. Nels. Abr. 1153. Mandamus (C) pl. 12.— [190]
cites 4 Mod. 37. Glide's Case.

7. Mandamus to the mayor &c. of Rippon to restore Sir J. Jennings to the place of *alderman*; they return, that Sir J. at such a time, at an assembly of the corporation, came, and personally, freely, and *debito modo resignavit* his office, *declaring he would continue to serve no longer, whereupon they chose another in his room*: this declaration in a corporate assembly was held good, especially since the corporation accepted it, and chose another; but till such election he had power to wave his resignation, but not afterwards. 2 Salk. 433. Pasch. 12 W. 3. B. R. The King v. Mayor of Rippon.

8. A mandamus was to restore the plaintiff to be a *burgess* of Colchester; the return was, that *time out of mind the burgesses were chosen by the commonalty every year, and that the plaintiff was chosen one year, which was expired, but not the next year*; and so his office expired. And the Court said, that if that hath been the

Burgess.

the usage, this Court will not alter it, but if he had been removed without cause within the year, they would restore him. 1 Roll. Rep. 335. Hill. 13 Jac. B. R. Colchester Town v. Northen.

This case is cited per Sir Edward Northey.— Holt's Rep. 351. as the case of Johns v. Jennings.

9. Mandamus to restore A. to the place of a *burgess* in a corporation, the mayor returned *that he was removed at his own desire and request*, and it was excepted to the return, that it did *not set forth how the corporation commenced*, by letters patents, or by prescription, nor *that the mayor &c. had any power to disfranchise*; but per Cur. though the return be insufficient, yet *there appears no cause to restore him*; for by voluntarily resigning he has *estopped* himself to say the mayor &c. had not power to remove, and therefore no restitution was awarded; and Hale Ch. B. (the case being put to him) was of the same opinion, and said that every corporation as a corporation have power to take such resignation, and consequently may remove for good cause. 1 Sid. 14. Mich. 12 Car. 2. B. R. The King v. Tiddesley.

10. Upon mandamus to restore W. R. to be a *burgess* &c. the return was, that he *refused to pay 2l. which was his share towards the charge of renewing their charter*, and therefore he was deposed; per Cur. this is no cause either to depose, or imprison him; but they must bring an action of debt upon a by-law. Sid. 282. Pasch. 18 Car. 2. B. R. Rippen Mayor's Case.

11. Mandamus to restore one Morris to the place of a *capital burgess* of the Devizes in Wilts; they return the causes of this removal, but did *not mention that he had any notice or particular summons to answer the charge*; and judgment was given according to the opinion of the Ch. J. Holt in GLIDE's Case, that the return was ill. 4 Mod. 37. cites it as Mich. 7 W. Morris's Case.

* S. P. Arg. Palm. 453. in Case of the King v. the Mayor of Oxford.

12. A mandamus issued to restore E. Chalk to the place of a *burgess* of Wilton, to which was *returned a custom for the mayor and burgesses to remove for misbehaviour*; then they *set forth several instances* of misbehaviour, and that he being thereupon fully heard to all that was objected in the common council of the mayor and burgesses, and it being fully proved upon him, they turned him out. It was objected that it was not said he was summoned; and cited Style 51. 446. 452. 3 Bulst. 189. 2 Keb. 489. Per Cur. The end of the summons is, that he may be heard for himself, and therefore ** where he has been heard, want of summons is no objection*; but this was afterwards determined on other objections. 2 Salk. 428. Mich. 8 W. 3. B. R. The Mayor and Burgesses of Wilton.

13. A mandamus was directed to the mayor, aldermen, and common council of G. to restore Lane to be a *capital burgess*; they *return their incorporation by several charters*, and by the last by the name of the mayor and burgesses of the city &c. *and that when any man is chosen, he is to continue for life*; but the mayor &c. may remove him; and then they return, *that Lane was duly elected, but that he wrote a scandalous letter to C. who was,*

Was, and still is *an alderman* of that city which they set forth; and then they return, that upon the 6th of _____ at a common council then held, he being there was charged with writing this letter, and that he did not deny it; but *gave his consent to be removed, and he was removed by the common council*. Per Powell J. a man may resign an office by parol, but they have not returned it so; per Holt Ch. J. I do not take a consent to be turned out to be a resignation; per Cur. a peremptory mandamus was granted. Holt's Rep. 450, 451. Hill. 8 Annæ the Queen v. the Mayor &c. of Gloucester.

14. A mandamus to the corporation of Doncaster to restore Mr. Vicars to be a *capital burges*; to which they return, *that the corporation have time out of mind had a toll for coals, viz. for every wain load going through the town a coal of the value of one penny; for every cart load a coal to the value of a half-penny; and for every horse load, a coal as big as a piece of wood, (kept time out of mind by the corporation.) That the said Vicars did, contrary to his oath, hinder the gathering of this toll as well by menaces to the toll-takers, as by perswading the owners of the coals not to pay toll, and telling them that he would uphold them in their refusal; after several arguments the Court was of opinion that it was not sufficient to turn him out; for Powell J. said, it was no more than saying the toll was unreasonable, when it appears so to be to the Court, and also uncertain; ideo a peremptory mandamus was granted. 11 Mod. 214. The Queen v. Vicars of Doncaster.*

15. W. being one of the council of Coventry was removed, and obtained a writ of restitution; and thereupon the corporation returned, that they had a custom to elect any to be of the *common council*, and to remove him *ad libitum*; and that W. was removed &c. and the Court held, that the return was good; and this difference taken, where a man is a freeman or alderman &c. they cannot remove him from his freedom or place without cause; and in such case such a custom is void, *because the party hath a freehold therein*; but to be of council is a thing collateral to a corporation. And then the council surmised that he was an alderman, and removed, whereupon a new writ was issued to restore him to his aldermanship. Cro. J. 540. Trin. 17 Jac. B. R. Warren's Case.

Common-council-man.

S. C. cited D. 332. b. pl. 28. in marg.—

Mandamus to restore J. S. to be one of the common council &c. the defendant returned that Coventry is

an ancient corporation, and that the King by a charter reciting their customs of which one was to elect and remove a common council-man *ad libitum*, did confirm all their customs, and that by virtue of the said custom time out of mind used &c. they did remove him; adjudged that the corporation thus constituted might remove him *without shewing any cause*; but this return was held ill, because it did not appear that the corporation had any such power (to remove one *ad libitum*) but only by the *recital*, whereas they should have returned positively, that they had that power. 2 Salk. 430. Mith. 10 W. 3. B. R. The King v. Mayor &c. of Coventry.

16. Mandamus to restore him to his place of *common council man* in the corporation of Eye in Suffolk; the return was, that *he was removed for speaking opprobrious words of one of the aldermen, (viz.) he is a knave, and deserves to be posted for a knave all over England;*

England; it was moved, that this return was insufficient; for words are not good cause to remove a man from a corporation, and in this case the words have *no manner of reference to the corporation*; wherefore it was ordered that he be restored. Vent. 302. Hill. 28 & 29 Car. 2. B. R. Jay's Case.

17. To a mandamus to swear him *common council man* for the town of Cambridge it was returned, that he had *not taken the oaths according to 23 Car. 2.* and good per Cur. after arguments. 12 Mod. 601. Mich. 13 W. 3. The King v. Love.

18. A mandamus was granted to restore 9 persons to their places of common council men in Chester; they return that by their charter in 20 H. 7. they (among other things) are impowered to choose 40 common council men yearly, and that *ante adventum of this writ, these 9 persons were chosen common council men, and so continued for a year, and then debite amoti fuerunt ab officio per electionem aliorum.* It was objected, that this return was uncertain, [192] for they may be chosen 40 years ago, and yet the return is true, besides it ought to be *amoti fuerunt*, and *not debite amoti*; and so held the Court and that they ought to have brought several mandamus's, and 9 men cannot join in one mandamus; for the election of the one cannot be the election of the other, and perhaps they were chosen at 9 several times, and Holt and Eyre thought the writ ought to be quashed. 5 Mod. 10. Mich. 6 W. & M. The King v. Chester City.

S. C. Lev. 162. Pasch. 17 Car. 2. and it appearing by the return that he was *suspended only*, but not turned out; and therefore per Hyde Ch. J. and Kelyng, a mandamus

lies not for *suspending* him, because the freehold is still in him; but Twisden J. totis viribus contra; for a suspension is an amotion pro tempore, and perhaps they will never discharge the suspension, and Windham J. being absent it was adjourned.

20. A citizen was *disfranchised for refusing to stand to the sword of two aldermen in a cause depending between him and another citizen*; whereupon he sued in C. B. to be restored again to his freedom, and a precedent was shewed of a writ in H. 6. time, viz. writ was directed to the mayor, aldermen and sheriffs in London with these words, viz. *ad restituendum ipsum ad pristinas libertates &c.* D. 232. b. pl. 28. Pasch. 16 Eliz. Middleton's Case.

In this case of Middleton, though the matter was in C. B. yet the writ of restitution was awarded out of B. R. because B. R. it is the highest Court for preservation of the peace, and it does not appertain to any other. Ibid. in marg. cites as per Doderidge.

21. Upon a mandamus to restore a *citizen disfranchised for speaking * contemptuous and scandalous words &c. to the mayor*, it was resolved that by the cause of disfranchisement returned it must be for some act done against his duty and oath, and to the prejudice of the publick weal of the city &c. whereof &c. nor can a freeman be disfranchised without authority so to do, either by exprefs words of charter or prescription, unless convicted by due course of law before he be removed; if they have such power and a sufficient cause is returned though it is false, the party shall never be restored, nor can any issue be taken upon it; for the parties are strangers and have no day in Court, but the party convicted may have an action on the case upon the special matter. 11 Rep. 93. Trin. 13 Jac. B. R. Bagg's Case.

* S. P. Palm. 451. Pasch. 3 Car. B. R. The King v. THE MAYOR OF OXFORD, but adjournatur, though in opening the case a charter of King James [was shewn] containing a grant to remove any alderman

for ill behaviour. — Lat. 229. S. C. transcribed from Palmer. — So of a *burgess* for contemptuous words of the mayor, and writ of restitution was awarded. Cro. J. 506. Mich. 16 Jac. B. R. Clerk's Case.

22. Upon mandamus to restore 5 persons to their freedom of a corporation the return was, that after the Court was adjourned by the bailiff, the persons disfranchised staid and affirmed they were a Court, and made several orders, which they caused to be entered in the Court-book, and then set forth, that for such offences persons have been used to be removed and discharged &c. Adjudged, that since custom is the chief cause of disfranchising any person, for thereby the party looseth his freehold, there appears no such custom on this return; for it is only a usage to remove &c. which is returned, and that is not a direct affirmation of any custom so to do. Nels. Abr. 1153. Mandamus (D) pl. 3. cites Style. 477. Yates v. Kingston on Thames.

Freedom of a corporation.

(D) To restore &c. to Preferments or Offices in, or [193] relating to Churches.

1. [T lies to restore a * church-warden, parish clerk &c. per Glyn. Ch. J. 2 Sid. 112. Mich. 1658. — * S. P. 8 Mod. 325. The King v. Singleton. — † Comb. 105. 145. S. P. — 6 Mod. 253.

2. A mandamus was prayed to restore a *sexton*; the Court doubted at first, whether they should grant it, because he was rather a servant to the parish than an officer, or one that has a freehold in the place; but upon a certificate from the minister and several of the parish; that the custom there was to choose a sexton, and that he held it for his life, and had 2d. a year for every house there, it was granted and directed to the church-wardens. 1 Vent. 153. Mich. 23 Car. 2. B. R. Isle's Case.

Raym. 211. S. C. — 2 Lev. 18. S. C.

3. It does not lie for a * clerk or register to a dean and chapter, unless there is an affidavit, that they have ecclesiastical jurisdiction.

* S. P. Because he hath nothing

to do with the publick, his office being only to enter leases granted &c. and that therefore he hath no more to do with the publick, than a bailiff of a manor. 3 New. Abr. 32.

diction. Comb. 133.—or of an *arch deacon*. Show. 253. King v. Hill.—It lies not for a *deputy register*, that is only at will; per Holt Ch. J. Show. ut ante.—Gibb. 194. adjudged that it lies for a *deputy register of the Spiritual Court*. The King v. Ward.

* Holt Ch. J. said, it had gone for such register, but against his will. 6 Mod. 18. Mich. 2 Annæ. B. R. in White's Case.

4. Holt Ch. J. said, he would never grant a mandamus to *swear the * register of the Spiritual Court, or an official*, but would put them to an assise. 12 Mod. 609. Hill. 13 W. 3. B. R. in Case of Ballard v. Gerard.

Mandamus was granted to admit Dr. Sherlock to a *prebendary*. 3 New. Abr. 532. cites Hill. 4 Geo. 1. The King v. the Chapter of Norwich.

5. It lies to a bishop to *induct a man into his prebend*. Arg. 8 Mod. 28.

(E) To Restore &c. to Offices &c. relating to Manors.

S.P. Agreed by all Sid. 169. Mich. 15 Car. 2. in Middleton's Case.—S. P. Per Holt Ch. J. 12 Mod. 666. Anon.—Comb. 127.—S. P. per Twisden J. who said, it was so ruled in 1652. in B. R. because the suitors are the judges of that Court; but Hale Ch. J. said, he was of another opinion, because the steward is judge of that part of the Court which concerns the copyholds; and is register of the other part. Mich. 23 Car. 2. B. R. 1 Vent. 153. in Isle's Case.—2 Lev. 18. per Hale, that it lies *if he be not at will only*; because he is an officer of justice.—Court Baron is a Court of justice. Yelv. 191.—But it was said, that the Ld. Ch. J. Holt had denied to grant it to such steward. 8 Mod. 98. in Case of the King v. Street.

1. **N**O mandamus lies for a *steward of a Court Baron*, because it is a private thing, and does not concern the administration of justice; per tot. Cur. And so Twisden J. said it was adjudged in this Court. 1 Sid. 40. Pasch. 13 Car. 2. B. R. Stamp's Case.

2 Sid. 212. Per Glyn Ch. J. it lies.—S. P. because the steward is judge. 1 Vent. 153. Mich. 23 Car. 2. B. R. in Isle's Case.—But Holt Ch. J. said, he would not care to grant it. 12 Mod. 666.

2. It was questioned, if it lay for *steward of a Court Lect.* Sid. 40. Pasch. 13 Car. 2. B. R.

[194] (E. 2) To restore &c. to Offices relating to Corporations and Pleadings.

1. **A** Mandamus was granted to the bailiffs, and common council of C. to restore A. to the office of *recorder*; and though several causes were returned of his removal, yet because *they had not summoned him to appear* and answer for himself, as to the crimes objected against him, therefore he was ordered

dered to be restored nisi. Sty. 446, 452. Pasch. 1655. The Protector [and Bernardiston] v. Town of Colchester.

2. A mandamus was granted to restore the recorder of Barnstaple; the mayor, to whom the writ was directed, returned, that *non constat nobis, that he was ever elected*; the return was adjudged insufficient, and restitution awarded. Raym. 153. Pasch. 18 Car. 2. B. R. The Recorder of Barnstaple's Case.

But it being insisted, that though the return be insufficient, yet that a mandamus nor any pro-

ceedings thereon gives no right, but only restores the ancient right, and if the party had none before, he will soon be turned out again, which would be a greater disturbance, therefore they directed that an action should be brought, and the right tried at the next assises. Sid. 285. Pasch. 18 Car. 2. Ballet v. Mayor of Barnstaple.—S. C. cited in a note by the reporter. Raym. 365. in Manaton's Case.

3. A mandamus was granted ballivis &c. villæ de Gippo to restore Serjeant Whitaker to the office of recorder; the return was responsio ballivorum &c. villæ de Gipwico &c. They return their charter, and that the recorder was amoveable pro malegesturis per ballivos & burgenfes, or the greater part of them, quorum ballivos duos esse volumus; that the serjeant was chosen ad libitum, that at such a sessions of the peace he had notice to attend, but did not, and that having notice to answer, he appeared and answered, and by the bailiffs and burgesfes &c. the bailiffs being then present, he was turned out; and further, that the inhabitants were never called by the name of bailiffs villæ de Gippo &c. Holt Ch. J. held, that this mandamus was ill directed, for Gippus and Gipwicus are different names, but then they should have returned this special matter, and relied upon it; but now they had admitted themselves to be the corporation to whom the writ was directed, by returning executio &c. The whole Court held, that though the bailiffs are only said to be present, they shall be intended to be consenting, either actually, or as included in the major part; and that the office being a publick office, relating to publick justice, non-attendance is a forfeiture. That his appearing and answering supplied the defect in the notice given him in not fixing a time for his appearance, and would have cured want of notice of the charge; but in this case the notice was to answer his non-attendance at a sessions of oyer and terminer, and therewith he was charged; whereas he is turned out for his non-attendance at a sessions of the peace, and indeed answered to that, though not charged with it, which the Court held incurable, and a peremptory mandamus was granted, but to be directed villæ de Gippo as the former; and though it was objected against a peremptory mandamus, because he was only recorder at will, yet since they did not return that matter, but relied upon his misdemeanors, and not upon their power, non allocatur. 2 Salk. 434. Hill. 4 Annæ. B. R. Serjeant Whitaker's Case.—Als. The Queen v. the Bailiffs &c. of Ipswich.

4. A mandamus was granted to restore one Blagrove to the office of steward of Reading; and about a month after he was restor'd, he was turned out again. Whereupon another manda-

[195] mus was granted. It was returned, that they were a borough time out of mind, and were incorporated by letters patents, anno 17 Car. 1. which gave them *power to choose a steward &c. and that they might under their common seal determine their will, and oust him at their pleasure*, or at the pleasure of the greater number of them for the time being; and this was held a good return. For the power of placing and displacing was admitted, and he being in, in pursuance of the patent shall be in by the patent. 2 Sid. 6. 49. 72. Pasch. 1658. Blaggrave's Case.

But afterwards the cause coming on again. Mich. 12 Car. 2. no restitution was awarded, because it appears by the return, that every mayor for the time being hath power to choose a town clerk; whence it follows, that he may remove the old one at pleasure. 1 Sid. 14. S. C.

5. Upon a mandamus to restore C. to the office of *town clerk* of Guilford, the return was, that the mayor might hold pleas in action real, as well as personal, and choose a town clerk, *who ought to hold a Court of frank-pledge there*, and to make warrants, and attend the mayor; that the defendant was elected town clerk by the mayor of the town, but that he *went into a place remote; whereupon he being mayor, chose another*, and so could not restore the defendant; it was objected against this return, that it was too general to say, that he neglected his office; and also that he ought to be summoned before the mayor in Court, to answer for himself. 2 Sid. 97. Trin. 1658. *Campion's Case*.

6. Mandamus to restore him to the place of *town clerk* of Hereford; the mayor &c. of Hereford returned, that H. *nunquam fuit debito modo admissus* to that place &c. It was argued, that this return was ill, and that it should have been *non fuit admissus* generally. Because if the return be false, the party may have action upon the case for a false return, which he will be deprived of, if the special return be allowed. And after several debates, it was held per Cur. that the return was ill for the reasons aforesaid. Sid. 209. Trin. 16 Car. 2. *Hereford's Case*.

7. A mandamus was granted to restore one Dighton to his office of * *town clerk* of Stratford upon Avon; the corporation returned, that *the King* by his letters patents granted, that they should have a *town clerk*, who *should continue durante beneplacito of the mayor and aldermen*, and that the said Dighton was chosen town clerk, and then turned him out; the question was, if the corporation has an arbitrary power to turn him out, or ought to shew a reasonable cause. And per tot. Cur. the continuation of him in his office is in the will and pleasure of the corporation, and therefore restitution was denied. But the Court advised to repeal the patent, because inconvenient. Raym. 188. Trin. 22 Car. 2. B. R. *Dighton's Case*.

8. Mandamus to the mayor &c. of Oxford to restore Slatford to the office of *town clerk*; they return their charter, which gives them power to *choose a town clerk to hold at the will of the mayor &c.* and they farther return the statute 13 Car. 2. cap. 2. and that of W. & M. about taking the oaths, and that the office *being*

being void, they chose Slatford, and that he took the oath of office *coram nobis majore & ballivis*, but did not *coram nobis majore & ballivis* take the oath of allegiance, per quod the office became void, & ea ratione &c. Per Cur. the party must take the oaths at his peril, without the magistrate's tendering them to him. 2. The return that he did not take the oaths before them was naught, because two justices have authority to administer the oath, and he might take it before them. 3. The corporation *do not* return a determination of his office by their will as the reason for not admitting him, but the special matter of not taking the oaths, and that being insufficient, a peremptory mandamus was granted. Salk. 428. Mich. 8 W. 3. B. R. The King v. Mayor &c. of Oxford.

(F) To restore &c. to Offices relating to the Law [196]
Common or Civil.

1. **M**andamus was granted to restore the place of *attorney in the Town Court* of Canterbury. Raym. 9. Hill. 15 & 16 Car. 2. Hurst's Case. Lev. 75. S. C. accordingly.—Sid. 94. S. C. but Court

divided, cites UNDERWOOD'S Case in 1651, who had a mandamus to restore him to his place of attorney in the *Marshall's Court*—Ibid. 152. That it was granted in the principal case, and cites COLLINS'S Case, who was restored to his place of attorney of *St. Martin's le Grand*.

2. Mandamus brought to restore an *attorney to his liberty of practising in a Court* in the county palatine of Chester; the return was, that the Court was held there before chamberlain, vice-chamberlain, baron, or the deputy of the baron, and that at a Court held there before the deputy of the baron, he spoke contemptuous words of him; and for this misdemeanor he suspended him from his practice, & *quod aliter non amotus fuit*; and the Court held this a good cause of suspension, and ordered a submission to him that received the affront in open Court before he should be restored. Vent. 331. Trin. 30 Car. 2. B. R. Parker's Case. And see the return itself at large.—2 Lutw. 1014.

3. Mandamus was granted to restore a *proctor in the Court of Arches*; but upon the return thereof, and after argument, it was resolved by Holt Ch. J. Gregory and Eyre J. (absente Dolben), that this was not such a public office for which a mandamus would lie. 3 Lev. 309. Trin. 3 W. & M. The King v. Lee. S. C. Carth. 169. That mandamus will not lie to restore a proctor.—3 Mod. 332. S. C.

4. Upon a mandamus to the commissary of York to admit Mr. Dryden a *deputy-register* under Dr. Sharp; it was objected, that the writ did not lie for an *ecclesiastical officer*, because he is under the enquiry and censure of his proper judge; nor for a private officer, because he may have his action on the case for a disturbance or an assize, in case the place be a freehold; and herein was cited the case of LEE, and the express opinion of
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my Ld. Holt therein, that a mandamus did not lie for a deputy register; the Court held, that this writ lay for a register, an officer much less spiritual than a prebendary, or the degree of doctor in divinity; also this mandamus is at the suit of Dr. Sharp, and sets forth his title to the office of register exercendum per se vel sufficient' deputatum suum; and that the commissary had refused Mr. Dryden, whom he appointed his deputy; and that therefore the mandamus was well awarded, because he had no other way to get his deputy admitted. 3 New. Abr. 531, 532.

(G) To restore &c. to Offices &c. *in general*; and Pleadings.

It lies for a constable.
Raym. 12.
Pasch. 13
Car. 2. in Stamp's Case.

1. **A Constable chosen and sworn in the leet** according to the custom, was displaced by the justices, and another elected by them was sworn in; whereupon those of the hamlet, according to their custom, did again chuse their former constable, and displaced the other, which other [or second constable] prayed a writ of restitution; but the displacing the first constable was held unlawful, and the other chosen by the justices to be removed; and this being agreed by the whole Court, no writ of restitution was granted; but the first constable was ordered to be restored. Buls. 174. Trin. 9 Jac, Constable of Stepney's Case.

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Cited Comb.
347.—Ibid.
348. S. P.
A mandamus was lately granted to restore one Smith to the office of clerk of the city-works; it appearing by

2. It will not lie to restore a man to be *clerk of the city works*; but Glyn Ch. J. said, that in this case the Court knew not without information what the office was, and so cannot be judges whether the return of the city be sufficient or not if a mandamus should be granted; but he thought a mandamus would lie in two cases: 1. To restore to an office which concerns the execution of justice. 2. If the office or degree be for the publick good; and bid them to move it again if they pleased. 2 Sid. 112. Mich. 1658. The Case of the Clerk of the City of London's Water-works.

h. ... that the office was an ancient office established time out of mind to survey the works and edifices of the city, and to see that all the city-buildings were well done; and to sign the workmen's bills, and that he was admitted into this office with the fees belonging to it, quamdiu se bene gesserit; and that there was an oath of office taken by him, and the oaths to the government; for the Court held, that though there was something here that looked like service by the nature of the employment, yet there being an oath of office, and oaths to the government to be taken, these import a publick office, for which a mandamus is proper. 3 New. Abr. 532.

B. a barrister of one of the temples was expelled the house, and his

3. A writ of mandamus will not be granted to call one to the bar who had studied the law 7 years; for there is no person to whom the writ should be directed. Admitted. Raym. 69. Hill. 14 & 15 Car. 2. in Townsend's Case.

chamber seized for non-payment of his commons, whereupon he by Newdigate prayed his writ of restitution, and brought the writ into Court ready framed, which was directed to the benchers of the said society; but it was denied by the Court, because there is none in the Inns of Court to whom the

the writ can be directed, because it is no body corporate, but only a *voluntary society*; and submission to government, and they were angry with him for it, and that he had waived the ancient and usual way of redress for any grievance in the Inns of Court, which was by appealing to the judges, and would have him do so now. March. 177. Hill. 17 Car. Booreman's Case.—S. C. cited Arg. Sty. 42.

4. Windham J. thought, that mandamus's *had not so great latitude formerly as now*; for by the same reason that it may now be granted to restore a master or fellow of a college, it might heretofore have been granted to restore abbots, priors, monks &c. which never was known to have been done; and therefore thought, that where the parties have franktenement, they may have assise, and where a less estate they may have an action upon the case. Sid. 169. in Middleton's Case.

5. It was granted to restore one Middleton to the office of *treasurer of the New-River water*, for the regulating whereof certain persons were incorporated anno 9 Jac. and amongst other officers appointed, this of the office of treasurer was one. Nels. Abr. 1145. Mandamus (C) pl. 16—cites Sid. 169. Middleton's Case.

Sid. 169. says, a mandamus was granted at last, and that the Court said they would dis-

pute the lying of it upon the return.—And Lev. 123. S. C. Mich. 15 Car. 2. says, that Twisden held that the mandamus well lay, but that Hyde Ch. J. thought it did not, because both corporation and office were private: but at length they assented that the writ should go, and they would consider further upon the return of it. The King v. the Governors of the New Water-works, London.

6. It was granted to restore one Stirling to his place of *workman in the mint*. Sid. 304. Mich. 18 Car. 2. B. R. Mandamus for STIRLING to the Moneys.

7. A mandamus, shewing that H. W. was debito modo constitut' *secretary of the Courts of the Marches*, by letters patents to be exercised by himself or deputy; and that the president and council had put out Luke Clapham his deputy, being duly constituted; they return *quod tempore deliberationis brevis* of mandamus *Luke Clapham was not constituted deputy*. Per Cur. though a mandamus does not lie for a deputy, yet it lies for him who deposes him, either to have him admitted or restored; for otherwise he may be deprived of his power to make a deputy. And this return is ill, that at the time of the writ delivered he was not constituted deputy; for perhaps they had put him out of his place before the writ came to them, and therefore a peremptory writ of restitution was awarded. 1 Lev. 306, 307. Hill. 22 & 23 Car. 2. B. R. The King v. the President and Council of the Marches.

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8. It was denied to restore a *surgeon to an hospital*; because it is not in the power of the Court; nor is it a publick office. Comb. 41.

S.P. 3 New. Abr. 532.

9. It lies for a *sword-bearer* to the mayor of Bristol. Comb. 145. Mich. 1 W. & M. B. R. Roe's Case.

S.P. 3 New. Abr. 532.

10. So for a *serjeant at mace* in Chester. Comb. 287. Trin. 6 W. & M. B. R.

11. Mandamus to restore him to the office of *clerk of the peace*

peace of &c. that the custos rotulorum of that county was displaced, and another constituted in his room, to whom the clerk of the peace refused to deliver the rolls. He was for this misbehaviour indicted and found guilty, and thereupon was removed from his office &c. Holt Ch. J. said, that the clerk of the peace ought to make out all process which cannot be done without the rolls; but when they are compleated, he must then deliver them to the custos, but so long as they are in process, they are to be with the clerk of the peace; and therefore thought it reasonable that defendant be restored, but the other three judges contra. 4 Mod. 31. Pasch. 3 W. & M. B. R. The King &c. v. Evans.

12. On a motion to restore W. to the place of *clerk of the company of butchers in London* it was alleged, that this was an *office by charter in which the plaintiff had a freehold*, and quoted the case of an *attorney of an inferior Court* where it goes; but per Holt Ch. J. that case differs; for 1. The office of an attorney concerns the publick; because it is an administration of justice. 2. He has no other remedy; but the principal case is altogether private; and if it be a freehold, assise or case lies. 6 Mod. 18. Mich. 2 Annæ. B. R. White's Case.

13. Mandamus was moved for to restore U. to the place of *approver of guns*, and setting his mark of approver upon the guns made by the company; and said, that selling guns not marked was a forfeiture of their charter, and that by a by-law made by them, they had appointed him approver, but now turned him out. But per Cur. it is a thing in which the publick has no concern, nor is there any publick law for it, and therefore out of the reason of a mandamus. But the way will be to petition the Queen, and she perhaps will order the attorney general to bring a quo warranto against them. 6 Mod. 82. Mich. 2 Annæ. B. R. Vaughan v. Company of gun-makers in London.

14. On a motion for a mandamus to restore the *register of the blacksmith's company*, the Court refused it, because they *did not produce their charter, or a copy of it with an affidavit*; for this being a *private corporation*, they held, they could not take notice thereof, as they will of a town &c. without such previous information. 3 New. Abr. 528.

(H) To enforce Things to be done relating to Corporations and Pleadings.

This Case is in Poph. 196. Pasch. 2 Car. B. R. by name of Audley v. Joy. And

1. THE office of *town clerk* of Bedford was granted to one in reversion after the life of the *town clerk* then living, who died, and another was chosen; yet the Court granted a mandamus to the reversioner. Nels. Abr. 1143, Mandamus (A) pl. 3. cites Poph. 196. Audley v. Ivy.

It seems not very clear that a mandamus was granted. And Crew Ch. J. doubted, whether

In such case restitution could be, and said that all the cases mention'd were where the person had once possession.—S. C. Noy. 78. by name of AUDLEY'S CASE. And that Audley had restitution.

2. It lies to the mayor of Colchester *to swear the high steward* [199] chosen there; per Holt Ch. J. Sty. 355. Mich. 1652. B. R. Col. Baxter's Case.

3. Mandamus upon removal of an officer may be to him *to deliver records &c. which are for publick justice* to the new officer. Sid. 31. Hill. 12 & 13 Car. 2. B. R. Town Clerk of Nottingham's Case.

4. A mandamus was granted to the mayor &c. of Oxford *to make one Townsend free of the city*, having served an apprenticeship to a taylor there for seven years, and his master refusing to make him free. And it was said, that if the writ would not lie, it would be a great discouragement to trade. Raym. 69. Hill. 14 & 15 Car. 2. Townsend's Case.

Afterwards the mayor returned, that if any person binds himself an apprentice the same, by the course of

their corporation, *is to be enrolled*; and, that the said Townsend did bind himself apprentice by indenture to one Colly for seven years, by which he *covenanted that he would not contract matrimony during his apprenticeship*, and that the indenture was inrolled according to the said usages; and that *he married within the two first years &c.* and afterwards served rather as a journeyman than an apprentice; it was argued to be an ill return, because the marrying is only a breach of covenant, and no reason to bar him of his freedom, and the other return of serving rather as a journeyman &c. is uncertain and not positive; and for this cause writ of restitution was awarded. Raym. 92. Hill. 15 & 16 Car. 2. Townsend v. Mayor of Oxford.—Sid. 107. S. C.—Lev. 91. S. C.

5. Mandamus to L. mayor of Trevena Beseley, to swear M. into the office of mayor there, he being elected by the said borough; L. returns, *that before the issuing the said writ, viz. 31 Car. 2. he the said L. was removed from the place of mayor, and one W. A. was then chosen, admitted and sworn, and from that time was and is still mayor burgi prædicti, and by reason of his office hath the custody of the common seal, and thereupon L. could not restore him*; it was argued that this return was ill, because it is *not returned, that the new mayor Amy was debito modo electus*, and it may be he was chosen out of time and not according to the charter, and returns must be certain, and not taken by implication, because the party ousted has liberty to reply to them; and of this opinion were two justices; but two other judges held, that it should be intended, that he was duly chosen. Raym. 365. Pasch. 32 Car. 2. B. R. Manaton's Case.

The reporter says, that he does conceive, and was, at the time when the cause was before the Court, of opinion that the return was not good, because only by implication. Ibid.

—In the Case of the Mayor of the Borough of

SALTASH. a like return was made, and it was resolved by the whole Court, that the return was insufficient, because it *does not answer the gist of the writ*; for by such return any officer may be kept out; because the party may procure another to be chosen before the party elected can procure a writ; and therefore the defendant ought to have returned, that *M. never was elected*, and so M. might have had an action for his false return; and so a new writ was awarded to the old mayor to swear and admit the plaintiff. Raym. 431. Pasch. 33 Car. 2. Veale v. the Mayor of Saltash in Cornwall.—S. C. 2 Jo. 177. Mich. 33 Car. 2. by name of the King v. Stephens.—Holt Ch. J. calls this a strange case, and says that it is contrary to subsequent resolutions. 6 Mod. 309. in Case of the Queen v. the Mayor of Hereford.

6. Mandamus to the jurats of Rye *to swear T. mayor*. An insufficient return was made by the minor part of the jurats by design,

design, whereupon a peremptory mandamus issued, and T. was sworn; afterwards a mandamus was prayed to swear one Crouch, he being said to be lawfully chosen; but it was denied by the Court, nor would they admit an examination which of them was lawfully chosen; for *after a peremptory mandamus granted and executed, the Court will intend him to be lawful mayor till the matter is tried in an action.* And in this case the parties consented to try it at bar in a feigned action. T. Jones 215. Trin. 34 Car. 2. B. R. The King v. Turner.

[200] 7. 7 & 8 W. 3. cap. 34. enacts, That every quaker, who shall be required upon any lawful occasion to take an oath &c. shall, instead of the usual form, be permitted to make his solemn affirmation or declaration; proviso, that no quaker or reputed quaker shall by virtue of this act be qualified to give evidence in a criminal cause &c. or bear any office or place of profit in the government. Upon a mandamus to the mayor of Lincoln, to admit one Morrice to his *freedom in that city*, he having served an apprenticeship there; the mayor returned amongst other things, that there was a usual oath to be taken by every one before the mayor &c. before admission to his freedom, and that M. offered to take the solemn affirmation and declaration, and that he was a quaker, and *refused to take the usual oath according to the custom of the said city*, which they set forth in hæc verba; *that to be a freeman of that city is an office and place of profit in the government*; and that there is a custom there for every freeman to vote in the election of two citizens to serve in parliament, *and to have pasture for three horses in the common &c.* The question was, whether the freedom of this city was a place of profit in the government; it was insisted, that it was, because it intitles him to vote for representatives in parliament; but it was answered, that was not a place of profit in the government; it is only a qualification or privilege to agree or consent to the person who shall be his representative in parliament; Per Cur. This M. hath a precedent right, and quakers are usually admitted in London upon their solemn affirmation, and so in this case. 5 Mod. 402. Pasch. 10 W. 3. The King v. Lincoln Mayor.

8. Mandamus &c. to the company of surgeons to chuse officers; they made a return under the common seal, and a rule was moved for and granted to file an information against some particular persons of the company for that return. And Holt said, they must proceed by way of information, because it being a matter which concerned publick government, no particular person is so concerned in interest, as to maintain an action; and the information must be against particular persons, though the return be under their common seal; for there is no other way to try the right, and if there is a verdict for the King, a peremptory mandamus must go, but perhaps they shall set but a small fine. 1 Salk. 374. Trin. 11 W. 3. B. R. The Case of the Surgeon's Company.

9. Mandamus reciting, quod cum they ought yearly to chuse *two bailiffs* out of those who had not been bailiff for three years before, ideo, they were commanded to chuse &c. They *return their charter to be to chuse two ex aldermannis, and that they had chosen two secundum formam & effectum of their charter generally;* and this was held ill, for they should deny their constitution to be as set forth in the writ, or shew a compliance with it, whereas they have acted according to a constitution set forth in the return *different from the writ without denying the supposal of the writ.* 2 Salk. 431. Trin. 11 W. 3. B. R. The King v. the Bailiffs and Burgeffes of Malden.

10. Mandamus to swear one into the office of *town-clerk* of Hereford; the return was, *that upon the election &c. B. had 18 voices, and the party who sued had but 17 voices,* and that he swore in B. Per Cur. it is a bad return, because it is argumentative, when it should be express that he was not elected; and Holt Ch. J. said, that the case in * 2 Jones 177. is a strange case, and contrary to subsequent resolutions. Mod. Cases 309. Mich. 3 Ann. B. R. The Queen v. Mayor of Hereford. But if the mayor had returned an election de facto, and that the parties had given a bribe to get himself chose, it had been something. Per Holt Ch. J. ibid.—* The King v. Stephens, als. Veale's Case.

11. Mandamus to admit Dunch to be an *alderman* of Norwich; they return, that *he was elected alderman by the ward, but refused by the mayor &c. because he had not received the sacrament within a year next before his election,* and that *he was turbulent and factious, and procured his election by bribery, and that non fuit electus;* the Court agreed that several causes might be returned, and that either not qualified or not elected had been a good return; but Holt Ch. J. questioned, whether the bribery will make the election void, because it did not appear to be an office which concerns the administration of justice, and within the statute of E. 6. The whole Court agreed, that as soon as D. was chose by the ward it was an election, and that *there being but one person sent to the Court of Aldermen, they did not choose but approve only, and that before approbation the election was compleat.* So that the return is repugnant, and the Court cannot tell what to believe; for at first they admit an election and avoid it; and yet at last return [201] that there was no election at all; and a peremptory mandamus was granted. 2 Salk. 436. Pasch. 5 Ann. B. R. The Queen v. the Mayor &c. of Norwich.

12. A motion was made for an information in nature of a *quo warranto* against a *common-council man* of Bristol for refusing to take upon himself the office after he was chosen. But the Court denied the motion, and said their remedy was to proceed by their by-laws, in order to compel him, he not being such a publick officer as a sheriff &c. but if they had applied to the Court for a mandamus they should have had it. 11 Mod. 142. Mich. 6 Ann. B. R. The Queen v. Hungerford.

13. Where a mandamus was granted to oblige a corporation

to

to proceed to the election of a capital burghs, and being afterwards moved, that a day should be fixed for the election, that all parties might have notice; for that otherwise the person obtaining the mandamus might steal an election by surprise; the Court refused to grant the motion, and held, that their power was only to command an election, but not to subscribe the manner of it, which was left to the law, and which must make it good or bad accordingly. 3 New. Abr. 528.

14. It is usual to grant a mandamus to magistrates *to deliver the ensigns* of their temporal offices. Arg. 8 Mod. 28. Hill 7 Geo. in Case of the Dean of Trinity Chappel in Dublin.

15. 11 Geo. 1. cap. 4. s. 2. enacts, *That if in any city &c. no election be made of the mayor &c. on the day, or within the time appointed by charter or usage, and no election shall be made pursuant to the directions prescribed by this act, or such election being made shall afterwards become void; it shall be lawful for the Court of King's Bench, on motion made, to award a mandamus, requiring the members of such city &c. having a right to vote, to assemble themselves on a day and time to be prefixed in such writ, and to proceed to election, or to signify to the Court good cause to the contrary; and thereupon to cause such proceedings to be made as in other cases of mandamus for the election of officers of corporations; and of the day and time appointed by the writ, publick notice in writing shall, by such person as the said Court shall appoint, be affixed in the market-place, or some other publick place 6 days before the day appointed, and such officer shall preside in the assembly as ought to have presided at the election of such mayor &c. in case the election had been made on the day herein prescribed.*

S. 3. *In boroughs and towns corporate, where the mayor, or other chief officer is to be nominated or sworn at a Court Leet, or some other Court, and it happens that no due nomination or swearing of such mayor &c. shall be made it shall be lawful for the Court of King's Bench upon motion to award a mandamus, requiring the lord or his steward, or other officer, to hold such Court Leet, or other Court, at such time as shall be judged proper by the Court of King's Bench, or to signify to the Court good cause to the contrary, and thereupon to cause such proceedings to be made as in other cases of mandamus for holding of any Court, and of the time appointed by such writ for holding such Court publick notice in writing shall, by such person as the Court of King's Bench shall appoint, be affixed in the market, or some other publick place 6 days before the day appointed; and where a nomination of persons in order to the election of any mayor &c. is to be made at such Court Leet, or other Court; after such nomination made, all other acts necessary to such election shall be done at such assembly, as the same ought to have been done if such election had been made on the day next after the expiration of the time prescribed by charter or usage.*

(H. 2) To enforce Things to be done relating to Colleges.

1. BY the statute 1 W. & M. 3. it is enacted, That if any *governour, head, or fellow of any college or hall in either of the universities shall neglect or refuse to take the oaths &c. for 6 months after 1 August &c. that then the government &c. and fellowship shall be void.* Several of the fellows of St. John's College in Cambridge had not taken the oaths pursuant to the statute, and thereupon a mandamus was directed to Humphry Gower, the head of that college, setting forth the statute, and that such fellows had not taken the oaths and that they still continued in their fellowships; therefore by this writ they were commanded to *remove them, vel causam nobis significetis: they return that the college was founded by Margaret Countess of Richmond; that the bishop of Ely for the time being was by her appointed visitor &c.* It was objected, that this is a remedial writ; that no precedent can be produced where it hath been granted to expel persons, but always to restore them to places of which they had been deprived, and that it will not lie where there is a *local and proper visitor*; sed per Holt Ch. J. the visitor is made by the founder, and is the proper judge of the laws of the college; he is to determine offences against these private laws; but where the law of the land is disobeyed (as it is in this case) the Court of King's Bench will take notice thereof notwithstanding the visitor, and the proper remedy to put the law in execution is by a mandamus. 4 Mod. 233. Mich. 5 W. & M. B. R. St. John's College's Case (in Cambridge.)

Mich. 5 W.
& M. B. R.
adjournatur.

2. Mandamus to admit Mr. King to the place of a scholar in St. John's College in Oxford, being nominated by the mayor of Bristol, to whom that right pro hac vice &c. doth belong; the substance of the return was that the college was founded by Sir Thomas White, that the bishop of Winchester for the time being was the local visitor; that after the nomination of Mr. King by the mayor of Bristol, the president of the college and 10 fellows assembled to consider of his qualifications, and that upon proof, it was their opinion, that he had committed several facts inconsistent with good manners; he was therefore refused as incapable &c. The better opinion was, that this return was too general, for there was no particular fact returned, so that it was impossible to try the truth of it in a collateral action. 4 Mod. 368. Mich. 6 W. & M. B. R. The King v. St. John's College in Oxford.

4 Mod. 260.
Hill. 5 W.
& M. B. R.
S. C. adjournatur. Ibid.
368. Mich.
6 W. & M.
B. R. adjournatur.

3. The Countess of Clare founded Clare-hall in Cambridge, and put the master and fellows under the power of the chancellor of that university for the time being, whom she appointed visitor; afterwards one Mr. Dickens added a fellowship to the foundation, to which one Jennings being chosen fellow, and the master

Mich. 10
W. 3. adjournatur.

master refusing to admit him to it, he brought a mandamus to the said master and fellows, who *return the local statutes*, one of which was, *that the majority of the fellows, and the master should chuse a fellow*; and *that the master (Dr. Blythe) did not consent to chuse Mr. Jennings*; then they return several offences mentioned in those statutes, and *that the foundress did appoint the chancellor to be visitor in omnibus &c.* It was insisted that this return was good, and that Mr. Jennings was never duly elected, because by the statutes of the place, the master's consent was absolutely necessary, and here he never consented; besides the examination of this matter doth not belong to B. R. because the foundress hath appointed a visitor; all which is very true, in respect to the *old foundation* by the Countess of Clare (*viz.*) that the fellows shall be subject to such restrictions and limitations as she hath prescribed by her statutes; but the *new fellowships erected by Mr. Dickens shall not be subject to those restrictions imposed by the foundress*, therefore the better opinion was, that a peremptory mandamus should go. Nels. Abr. 1154, 1155. Mandamus (D) pl. 12. cites 5 Mod. 421. Jennings's Case.

[203] 4. Whether a mandamus will lie to a visitor to compel him to execute his jurisdiction was said by my Lord Hardwick in Dr. BENTLEY's Case, Hill. 9 Geo. 2. not to have been determined, though a rule for that purpose to shew cause, was made 12 Annæ. and he seemed to think, that if this power of a visitor be a jurisdiction, yet it is *forum domesticum*, and not any public jurisdiction, or rather a decision of the founder, or upon his own private charity than any jurisdiction at all. 3 New. Abr. 533.

5. 1 Geo. 1. cap. 13. s. 13. enacts, *That if any head of a college or hall in either of the universities &c. refuses to admit such person as is nominated by the King to succeed such person as have refused to take oaths appointed to be taken by this act within the time therein limited, the King's Bench may issue out a mandamus to the visitor to admit such person.*

6. Where the bishop of Ely procured a mandamus to the vice-master of Trinity-College, Cambridge, to compel him to execute a sentence of deprivation pronounced by the bishop against Doctor Bently master of the said college, and which sentence the vice-master by the statutes of the college was obliged to execute; and it appearing on the face of the writ, that the bishop himself was *general visitor*, and that therefore it belonged to him to enforce the execution of his own sentence, the Court of B. R. quashed the writ, being a matter in which they had no right to intermeddle, there being a proper visitor. 3 New. Abr. 529.

(H. 3) To enforce Things to be done relating to
Spiritual Courts, and Pleadings.

1. A Man made his executors of goods in Virginia and died; the executors refused, and the next of blood prayed administration to be granted according to the statute of 27 H. 8. and the ordinary refused, and for this they came into B. R. and prayed a *mandamus to command them to grant administration to the next of blood* according to the statute, and per tot. Cur. a *mandamus was granted*; for this Court has jurisdiction of all other Courts, as well in cases of misfeasance, as in cases of non-feasance. 2 Sid. 114. Mich. 1658. B. R. Anon.

Hale Ch. J. said he never knew such writ though the opinion has been so; but Sir William Jones said it was Sir GEORGE SANDS's Case after

great debate. Vent. 188. ——— A *mandamus* was moved for to the surrogate of the bishop to grant administration to B. The case was, that administration had been committed to one who died, and made an executor, who would have had it committed to him and not to the next of kin to the intestate. Holt Ch. J. said, it cannot be, but it must be committed to the next of kin to the intestate; and granted a *mandamus* for that purpose. 11 Mod. 137. Mich. 6 Annæ B. R. Anon.

2. A *mandamus* was moved for to the Spiritual Court to deliver to the heir of the devise a will of land, which was proved there 14 years since in common form, which they refused to deliver unless the heir would obtain a definitive sentence, which would cost 10*l*. But the Court doubted whether to grant it or not, because no such was remembered to have been ever granted; and therefore said, that if precedents of *mandamus* in such case cannot be produced they would not grant it, but that the party may have action upon the case if he will. Sid. 443. Hill. 21 & 22 Car. 2. B. R. Sabine's Case.

It lies to the Spiritual Court to deliver a will proved there per testes, to the executor. Comb. 289. Trin. 6 W. & M. B. R. Anon.

3. A *mandamus* was prayed to the Ecclesiastical Court to swear two church-wardens elected by the parish, surmising that so was the custom in that place, but that the bishop's officers had refused to admit them, upon pretence that the parson ought to choose one; and it was granted. 1 Vent. 115. Pasch. 23 Car. 2. B. R. Anon.

Mandamus to the archdeacon of Norwich, to swear a church-warden, suggesting a custom, that

the parishioners are to choose the church-wardens, and that the archdeacon refused him, though he was chosen according to custom; the archdeacon returned, that non sibi constat, that there was any such custom; (which form is not allowable; for it ought to be positive, on which an action might be grounded) and that by the canon the parson is to choose one &c. The Court said, that custom will prevail against the canon, and a church-warden is a lay officer, and his power enlarged by several acts of parliament, and that it has been resolved, that he may execute his office before he is sworn, though it is convenient that he should be sworn, and if the plaintiff here were sworn by a *mandamus* from B. R. they advised him to take heed of disturbing him. 1 Vent. 267. Hill. 26 & 27 Car. 2. B. R. Anon.

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4. A *mandamus* was moved for, to be directed to the judge of the Prerogative Court to command him to proceed in proving a will, against which a caveat was entered; and the rather, for that the will was not controverted but the probate stopped for a col-

lateral cause; and the mandamus was granted by three judges absente Hale. Note, the suggestion for the mandamus was brought into Court and read before the mandamus granted. Raym. 235. Mich. 26 Car. 2. B. R. Dunkin v. Mun.

5. A mandamus was granted *to prove a will* in common form, *and to have a probate* under seal. 2 Show. 48. Pasch. 31 Car. 2. B. R. Anon. cites Fitzh. 202. Sty. 22. Dunkomb's Case.

6. Mandamus was prayed to the Ecclesiastical Court to *grant a probate of a writ under seal &c.* The case was thus. An executor named in the will *had taken the usual oath and then refused, and afterwards a caveat being entered, and J. S. endeavouring to get administration &c. desired the will under probate, and the executor contested the administration to J. S.* which the Ecclesiastical Court adjudged against him, supposing that he was bound by his refusal; thereupon he appealed to the delegates, and afterwards moved for this mandamus, which was granted; for *having taken the oath he cannot afterwards refuse, and that Court had no farther authority; and the caveat did not alter the case.* 1 Vent. 335. Pasch. 31 Car. 2. B. R. Anon.

7. Mandamus to Sir Thomas Exton, commissary to the dean and chapter of St. Pauls London, *to swear* Edward Carpenter one of the *church-wardens* of Stoke Newington in Surry, the doctor finding that there was a dispute between the parson who claimed a right by the canon to choose one, and the parishioners who claimed a right by *custom to choose both*, and therefore to save himself from a contempt, and that he might not be liable to an action for a false return, he *returned the fact* after this manner, *that there was a suit depending in the Spiritual Court, between the parson and the church-warden chosen by him, and the church-warden chosen by the parishioners; then he sets forth their allegations on each side, which were admitted by that Court, and that the parishioners produced witnesses to prove the custom of choosing two churchwardens, and a day was appointed for a proof, but that they neglected to have them then examined, and that the Court was ready to give sentence for the right of the parishioners when they should prove the custom; then he certifies that he gave the oath of church-warden to one of those who was chosen; but this Court awarded a mandamus to swear the other, because the Spiritual Court cannot try this custom as alleged in the return.* Raym. 439. Pasch. 33 Car. 2. B. R. Carpenter's Case.

8. Mandamus to the precentor and canons of the cathedral of St. David *to admit* Dr. Owen to be a canon there; a custom was alleged that time out of mind the precentor and canons (no canonry being void) had used to choose one to succeed to the next avoidance and to enter his name in the registry by the name of supernumerary, and that he who was so chosen ought to be admitted to the next vacancy; and that he was chosen supernumerary, and afterwards a canon died; and that the precentor and canons being requested refused to admit him; it was objected

ed against the mandamus, that the office of canon was meerly spiritual, and of ecclesiastical cognizance; and on the other side it was insisted, that the party had no other remedy, but by a mandamus; but the Court delivered no opinion as to this point; but the mandamus was denied, because it is a ridiculous custom to elect where no canonry was vacant. 2 Jones 199. Pasch. 34. Car. 2. B. R. Dr. Owen v. Dr. Stainbow.

9. It doth *not* lie to restore a parish clerk who was 4 years in the office, but never sworn, and therefore turned out by the succeeding parson; but the Court granted a mandamus to swear him, and then he might take his remedy against the parson; for it is a temporal office, and he hath no authority to displace him. Nels. Abr. 1151. Mandamus (B) pl. 5. cites March 101:

the parishioners, and displaced by the parson. 11 Mod. 221. Pasch. 8 Annæ. B. R. Kid v. Doctor Watkinson.

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A mandamus was granted to restore a parish clerk, he being elected by

10. Mandamus to the surrogate of Dr. King the archdeacon of the diocese of London, to swear J. S. church-warden of C. being elected by the inhabitants according to the custom of that parish; defendant returned, that it did not appear to him per aliquod scriptum that J. S. was duly elected; and that the bishop of London had inhibited Dr. King, and any person acting under him to swear this J. S. and therefore he could not swear him, and that the mandamus did not set forth that C. was within the diocese of London. It was answered, that though the mandamus does not precisely mention C. to be within the diocese of London, yet when the return mentions that the bishop of L. had inhibited the archdeacon &c. that is sufficient to shew the Court that it was within his diocese; therefore a peremptory mandamus was granted: 8 Mod. 325. Mich. 11 Geo. The King v. Singleton.

Non fuit electus was adjudged no good return. Ibid. cites the King v. White.

11. Mandamus to the chancellor or surrogate of the bishop of Chester to swear a church-warden into his office, who returned, that the person was not duly elected, and thereupon an action on the case was brought against the chancellor, in which the plaintiff declared, that he was duly chosen &c. and that the defendant refused to swear him; thereupon the plaintiff moved for a mandamus to swear him, and it was granted; then he alleges, that he offered himself to the chancellor to be sworn, who refused and made a false return of the mandamus, (viz.) that the plaintiff was not duly elected, quorum pretextu he was deprived of his office. Nels. Abr. 1146. Mandamus (A) pl. 22. cites 2 Lutw. 322.

12. Mandamus to the archdeacon to swear a church-warden being duly elected, who returned, that he was pauper lactarius & servus minus habilis &c. and thereupon a peremptory mandamus was awarded; for a church-warden is a temporal officer, he has the property and custody of the parish goods, and as it is at the peril of the parishioners, so they may trust whom they think fit; and the archdeacon has no power to elect or controul

The return by the archdeacon was as here, and that the person chosen was unfit to execute the office, and so

he could not swear him; whereupon a peremptory

their election. 1 Salk. 166. Hill. 8 W. 3. B. R. Morgan v. Archdeacon of Cardigan.

mandamus was granted; for being appointed by the parish, they are answerable for him. 12 Mod. 116. Hill. 8 W. 3. seems to be S. C. by the name of the King v. Rees.—Carth. 393. S. C.

13. Mandamus to the Spiritual Court to grant administration to J. S. who, as he suggested, was next of kin to the intestate: this mandamus being granted, was afterwards superseded, because J. S. being formerly cited, refused to come in; whereupon another of kin sued for administration, but was opposed by one who pretended there was a will, which matter was still depending, and therefore till that was determined the judge could not obey this mandamus. And by Holt Ch. J. there is a difference where there is a controversy, and where there is no controversy. In case of no controversy we grant a mandamus upon a suggestion that J. S. died intestate, and that T. S. is next of kin, and if it be false they may take issue upon it; but where there is a controversy we will not grant a mandamus till the controversy be determined. For suppose the will should prove good, what then will the granting administration signify? 5 Mod. 374. Mich. 9 W. 3. Anon.

He was executor in trust for 3 infants. 12 Mod. 205. S. C. where it seems to have been [206] the Case of Paine v. Watts.

14. Mandamus was granted to admit an executor to prove a will, which the Spiritual Court refused unless he would give security, it being suggested that he was insolvent, and had a legacy by the will. Upon a peremptory mandamus being granted a bill was filed in Chancery in behalf of the other legatees, being infants, and the Court enjoined him from intermeddling with the assets any farther than to satisfy his own legacy; for in equity he is but a trustee for the infants; and where a trustee is insolvent, Chancery will compel him to give security before he shall enter upon the trust. Carth. 458. Mich. 10 W. 3. B. R. The King v. Sir Richard Raines.

15. Mandamus to swear A. and B. church-wardens, suggesting that they were debito modo electi; the return was, that they were not debito modo electi; it was objected, that it ought to be in the disjunctive, nec eorum alter electus fuit; but per Holt Ch. J. it was resolved, that one cannot be sworn upon this writ; for either both are chosen, or the writ is misconceived. 2dly. Where the writ is to swear one debito modo electus, there a return that he was not debito modo electus is a good return; for it is an answer to the writ. But where it is to swear one electus church-warden, there quod non fuit debito modo electus is naught; because it is out of the writ and evasive. 2 Salk. 433. Mich. 1 Annæ. B. R. The Queen v. Twitty and Maddicot.

16. Mandamus to the official of &c. to swear A. and B. church-wardens of the parish of &c. The return was, that they were not duly chosen; but a peremptory mandamus was granted, because the official should have complied with the writ as far as he could, and have sworn one of them, if the truth was that one

one of them was duly chosen; or else he should return that neither of them was chosen; for if the parishioners claim a right to chuse two, he should have made a special return of it, and that the persons chosen had an *equal number of votes*, that the parson had chosen his man, and that he could not swear either of them chosen by the parishioners, because they had an equal number of votes, and at last, by direction of the Court, they agreed to try the custom in a feigned action. 6 Mod. 89. Hill. 2 Ann. B. R. The Queen v. Guy.

17. Mandamus was granted to admit Mr. Faulkes *apparitor general* to the archbishop of Canterbury. 3 New. Abr. 531, 532. cites the King v. Doctor Bettefworth.

18. A mandamus will not lie to oblige the ordinary *to grant administration durante minore etate* of an enfant to the next of kin, this being a matter out of the statutes, and therefore discretionary in the ordinary to whom to grant it, and if in such case he grants it to an improper person, or insists upon unreasonable security, the redress must be by appeal; and if in the last instance there be any remedy at common law, it must be by prohibition. 3 New. Abr. 535.

(I) To inforce Things to be done relating to Inferior Courts of Law.

1. **A.** being owner of ground adjoining to Newgate market in London, *had some of his said ground laid to the said market for the enlarging thereof, and thereupon according to the acts of parliament of 19 Car. 2. cap. 8. and 20 Car. 2. prayed satisfaction from the city, and had a jury impannell'd, who gave him 500l. and upon that verdict the mayor and aldermen refused to enter up judgment, and thereupon A. prayed a mandamus to make them give judgment; and it was granted.* Raym. 214. Hill. 23 & 24 Car. 2. B. R. Amherst's Case. So to the Court of Sandwich, to give judgment in an action of assault and battery. 3 New. Abr. 535.—So a mandamus to the Sheriff's Court in London to give final judgment upon a writ of inquiry. Ibid. 536.—So a mandamus to the bailiff of Andover, to give judgment in a cause there depending; but the Court in this case required an affidavit of their refusal, or else it should be presumed, that the Court would do right. Ibid.—So a mandamus to the corporation of Liverpool to hold an assembly for doing the publick business; which was making leases. Ibid.

2. *Debt for rent in the Court of Cambridge, where upon the evidence the plaintiff was nonsuited; the defendant had judgment, but the mayor refused to execute the same, taking security from the plaintiff for his indemnity; whereon a mandamus was moved for, or that the mayor should shew cause why he should not execute the said judgment; but the Court denied the motion, seeing he had a legal remedy, viz. a writ de executione judicii out of Chancery.* 12 Mod. 196. Trin. 10 W. 3. Wilkins v. Mitchell. [207]
In the Case of the King v. the Bishop of Ely it was said per Lee Ch. J. that the law had been held contrary ever since. Pasch

11 Geo. 2. Doctor Bentley's Case.
(K) To

(K) To enforce doing Things relating to *Justices of Peace &c.*

See 2 Show.
74. Trin.
31 Car. 2.
B. R. the
King v.
Surry Jus-
tices. S. P.
them to their audita querela.

1. **M**andamus was granted *to justices of peace to give judgment* in a man's case upon the statute for release of *poor prisoners.* Comb. 203. Pasch. 5 W. & M. B. R. Trevannion's Case.

but says, the Court have always since refused to intermeddle in that act, but put

2. *Mandamus to enforce a constable to return a warrant for levying money by distress upon the act against deerstealers was denied.* The sessions may fine him; and if a mandamus be granted, and he disobey, the Court can only fine him for the contempt, and the justices of peace may do it as well. 6 Mod. 83. Mich. 2 Ann. B. R. Morley v. Staker.

3. *Mandamus against justices of peace to issue their precept to inquire of a force upon affidavits of a forcible entry was granted.* 6 Mod. 139. Pasch. 3 Ann. B. R. Goldson & al. Justices of Ipswich's Case.

6 Mod. 228.
229. S. C.
And says
that then
they moved
for a manda-
mus for the
justices to
take secu-
rity from
him not
to become
chargeable
to the pa-

4. *A dissenting minister having qualified himself in one county removed afterwards into another, and kept a new conventicle in that county, supposing that he need not qualify himself for that county.* The justices convicted him notwithstanding the toleration act; the attorney general moved for an attachment against the justices; but that being denied, he moved for a mandamus to permit him to preach, which was denied also; for a mandamus is always to do something in execution of law, but this would be in nature of a writ de non molestando. 2 Salk. 572. Mich. 3 Ann. B. R. The King v. Peach.

which was also deny'd; for that matter is only to be upon complaint of the church-wardens and overseers of the poor. And at last they moved for a mandamus to the sessions to state the fact specially; but it was denied; for that the statute excludes all others from examining the fact. And finally they moved for a procedendo to a certiorari already brought by them in order to appeal the sessions, which was granted.

5. *Mandamus was directed to three justices of peace in the country to take security of the peace, in regard of defendant's great age and the great distance.* Gibb. 85. Trin. 2 & 3 Geo. 2. B. R. Lewis v. Lewis.

(L) To enforce doing Things relating to *Manors.*

1. **W**RIT shall be directed *to the lord of a manor* commanding him *to hold Court* by which justice may be done his tenants;

nants; per Mountague Ch. J. 2 Roll. R. 107. Trin. 17 Jac.
B. R. in an anonymous Case.

(M) To enforce doing Things relating to *Nusances*. [208]

1. **M**andamus lies *to remove a nuisance*, as a bowling-green, or a mountebank's stage; but by Northey such a writ must be grounded on some record, as in JACOB HALL's Case. Mod. 76. it was presented by the grand jury, or the justices might record it on their view. Comb. 282. in Case of the King v. St. John's College Cambridge.

(N) To enforce Things to be done relating to *Officers of Courts*.

1. **M**andamus *to swear one into the office of one of the eight men of Ogborne-court*, he being elected thereunto. sed per Curiam it was denied, because it did not appear *what the office was*, that the Court might judge, whether it was for such an office for which a mandamus would lie. Nelf. Abr. 1146. Mandamus (A) pl. 32. cites 2 Mod. 316. Anon.

2. Mandamus *to the dean and chapter of Westminster to admit Mr. Knipe to the office of high bailiff* upon the nomination of the Duke of Ormond, who is high steward; it was objected, that it is the dean and chapter, and not the high steward, who is to appoint a person to this office; for they have *retorna brevium*, and of common right they who have such a franchise have power to appoint an officer for that purpose, who is the high bailiff, and when he is admitted is called *ballivus decani & capituli &c.* The dispute is now between two persons, whether the high steward, or the dean and chapter are to put in the high bailiff; the publick justice of the nation is not concerned in this matter; if Mr. Edwin hath any prejudice, he may bring an action; sed per Curiam, such action will not put him in possession, so a mandamus was granted. Nelf. Abr. 1147. Mandamus (A) pl. 38. cites 4 Mod. 281. Knipe v. Edwin.

(O) To enforce doing Things relating to *Poor and Church-Rates, Taxes &c.* and Officers.

1. **M**andamus to justices of peace to *sign, allow, and confirm* *poor rate*, but adjournatur for the words in 43 Eliz. *is consent*. Carth. 450. Pasch. 10 W. 3. B. R. The King v. Dean and Chapter of Norwich. It was granted. 8 Mod. 10. Church-wardens of Bishopgate v. Alderman Beecher. Mich. 7 Geo.—Ibid. 235. The King v. Beecher.—And also to make a rate, where one parish wants contribution from another. 8 Mod. 344. Hill, 11 Geo. The King v. St. Mary's in Marlborough.

* 8 Mod. 338. The King v. Rotherhith Parish.—It was granted to two distinct jurisdictions to make a poor rate for *relief*. Comb. 422. Hill. 9 W. 3. B. R. The King v. Norwich &c.—Ibid. 478. Pasch. 10 W. 3. B. R.

2. No mandamus lies to overseers of the poor to make a rate to * *reimburse former overseers*. 2 Salk. 531. Hill 2 Annæ. B. R. Tawney's Case.

The writ is bad; but if [209] it was good, a mandamus was not a proper remedy for an unequal taxation; but the proper remedy is by appeal to the commissioners: but, perhaps if the *assessors refuse to tax any part*, as the case of Sturbridge-fair is, a mandamus lies. The writ was quashed. 11 Mod. 254. Mich. 8 Annæ. B. R. Dr. Butler v. Corbet.

3. The Court upon motion granted a mandamus to the commissioners of the land tax for Barnwell to tax the lands there equally. 11 Mod. 206. pl. 6. Hill. 7 Ann. B. R. The Queen and the Commissioners of the Land Tax for Barnwell.

4. It was granted to a justice of the peace to grant a warrant to distrain for a poor rate. 8 Mod. 10. Mich. 7 Geo. Bishopsgate Church-wardens v. Beecher.

5. On a motion for a mandamus to the old church-wardens to deliver the parish books to the new church-wardens &c. it was afterwards shewn for cause against the motion that it was new, and the like had never been made before in this Court. But it was insisted on, that the old church-wardens had a right to keep the parish books, and so the rule was discharged; for a contest between parish officers which of them ought to keep the books, must be tryed at law by a feigned issue. 8 Mod. 98. Mich. 9 Geo. The King v. Street and Stroud.

(P) To whom to be directed.

1. Mandamus was granted to restore a sexton, and it was directed to the church-wardens. Vent. 153. Mich. 23 Car. 2. B. R. Ile's case.

2. Whether a mandamus ought to be directed to the mayor and aldermen of London, or to the Court of the mayor and aldermen of London, to swear a sheriff, where the custom is to swear the sheriff in the Court. See Skin. 64. Mich. 34 Car. 2. B. R. Papilion v. Dubois.

3. A mandamus was directed Jacobo Courteen *majori ballivis & omnibus principalibus burgensibus burgi de Abingdon*, who by the constitution were to chuse the mayor out of such persons as should be propos'd by the commonalty, commanding them to choose accordingly: it was objected to the writ, that it was misdirected; for that this was but a part of the corporation, viz. *chief burgeses*, whereas the name of the corporation was *mayor, bailiffs, and burgeses*; and it was urged, that persons constituting a corporation could be considered, but in one of these two capacities, viz. their corporate or their natural; and that the writ must directed to them, either by their names, or

as a corporation; and they cited *Holt's Case*, 2 Jones 52. in point. Holt Ch. J. said, that case was not law, and that Sergeant Pemberton, Sir William Jones, and all the learned part of the bar wondered at the resolution: and though it should be true, that a * *mandatory writ* might be directed to the whole corporation, yet it could *not* be necessary it should be directed to more than those, or that part of the corporation that was concerned in the execution of the thing required; for it is not in the power of others to put the command of the writ in execution, and the writ was held good. 2 Salk. 699, 700. Pasch. 12 W. 3. B. R. The King v. the Mayor &c. of Abingdon.

*Holt Ch. J. said, that it is sufficient to be directed only to such persons as are to do the thing required to be done. And therefore where a mandamus was directed to the mayor and alder-

men of H. to admit one to the office of town-clerk, it was objected that the writ was ill directed; but Holt thought the word *aldermen surplusage*, and the writ well enough; but Powell J. contra, writs ought to be directed to those, and to those only that are to obey the writ. How will people know who are to obey the writ, if the direction is insignificant or immaterial? If a writ be directed to a coroner and sheriff where it ought to be to one only, it is naught: Powys and Gould justices agreed, and the writ was quashed. 2 Salk. 701. Trin. 4 Annæ B. R. The Queen v. Mayor of Hereford.

4. A mandamus was directed to the mayor, aldermen and commonalty of R. who return'd themselves to be incorporated by the name of mayor, burgeses and commonalty. The Court held the writ naught, because it was directed to the corporation by a wrong name. 2 Salk. 433. Pasch. 12 W. 3. B. R. The King v. the Mayor &c. of Rippon. [210]

5. A mandamus may be directed to a corporation by the name of a corporation, or to those who have power of removal; per Powell J. Holt's Rep. 451. Hill. 8 Annæ. The Queen v. Mayor &c. of Gloucester.

(Q) How to be brought; Jointly, or not &c.

1. *FIVE* persons cannot have one writ of mandamus to be restored, for though the end of the writ is to do justice, yet the foundation is the wrong in turning them out, and the turning out of one is not the turning out of another; nor can several persons join in an action on the case for a false return; per Holt Ch. J. 2 Salk. 433. Mich. 12 W. 3. B. R. The Case of Andover.

12 Mod. 332. S. C. —Nor can several persons be joined in a mandamus. 8 Mod. 209. Hill. 10 Geo. The King v. the Mayor of Kingston upon Hull.—5 Mod. 11. Mich. 6. W. & M. The King v. Chester City.

(R) Returns, Good or not. In General.

1. *THO'* a return be insufficient, yet if it appears to the Court, that the party has no cause to be restored, the Court will not restore him; per Twisden J. to which the Court agreed. Sid. 14. Mich. 12 Car. 2. B. R. The King v. Tidderley.—And so he said it was ruled in Winchester's Case.

2 Lutw.
1014. S. C.

2. A mandamus to restore an attorney to his liberty of practising in a Court within the county palatine of Chester was returned, that the Court was holden before the chamberlain, vice-chamberlain, baron or the deputy of the baron, and that at a Court before the baron's deputy *he spoke contemptuous words of him*, whereupon he suspended him from his practice, & quod non aliter amotus fuit; upon exceptions offered to the return, the Court held it good cause of suspension, and ordered a submission to him who received the affront in open Court before he should be restored. Vent. 331. Trin. 30 Car. 2. B. R. Parker's Case.

Carth. 170.
—LAMB-
BERT'S
Case S. C.
and P. but
says that it
had been
better to have
made a ge-
neral return
viz. non-

3. Mandamus was awarded to restore Dr. L. to the office of archdeacon of Salisbury, and returned *quod non fuit debite electus*; and argued to be bad, because a negative pregnant, but it ought to be non fuit electus, ut dicitur. 1 Sid. 209. 210. but per Cur. it is good; for the writ recites *licet fuit debite electus*, and the return is a direct answer, and so held at the end of the case reported by Siderfin. 12 Mod. 2. Mich. 2 W. & M. The King v. Lambert.

quam fuit electus in officium, without saying debite.—* Non fuit electus is a good return to a mandamus; but to set forth that a burgess is *præfatus & juratus*, which is no more than that he is preferred and sworn to that office, is not good. 11 Mod. 174. Pasch. 7 Annæ. B. R. The Queen v. Corporation of Cornwall.—* S. P. and a Case was over-ruled that had been adjudged contrary. Gibb. 195. Hill. 4 Geo. 2. B. R. The King v. Ward.

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4. To a mandamus to restore A. to the office of common-council-man of the city of Bristol 3 articles were returned; and to the first article it was objected that it was insufficient, the matter therein contained being no ground for a disfranchisement, or if it was, it is not sufficiently alleged; for it is only said *that A. wrote such a letter*, but not that it was ever published, and the writing only if never published cannot be any scandal; and to the second it was objected that it was altogether uncertain it being only alleged, *that he threatened the mayor and aldermen*, and it does not appear by the return that there are any aldermen in Bristol, or that he used any particular force; and as to the third, that it is very trivial; for nothing is pretended by it, but a request made by A. to bring the common council book before the lord lieutenant *ea intentione &c.* which was never granted, and for ought that appears to the contrary, this request might have been made by the majority of the common council; then it was insisted that there cannot be any cause to *disfranchise a member of a corporation, unless it be for a thing done which works to the destruction of the body corporate, or to the destruction of the liberties and privileges thereof*, and not any personal offence from one member to another, and of that opinion was the whole Court whereupon A. had a peremptory mandamus to restore him, the causes returned being altogether insufficient to remove him. Carth. 173. to 176. Hill. 2 & 3 W. & M. B. R. Sir Thomas Earl's Case.

5. The rule that *all the matter contained in the return is to be taken*

taken as true, will not hold where it appears judicially to the Court to be false; per Cur. Skin. 294. Trin. 3 W. & M. B. R. The King v. City of London in Sir William Smith's Case.

6. Nothing is to be *intended* in the return to a mandamus; per Holt Ch. J. Show. 282. Mich. 3 W. & M. in Case of the King v. Evans.

7. A charter had the following clause, viz. That any officer to be chosen &c. non diutius remanebit in officio &c. quam infra burgum pred. vel libertat. & franchises inde cum tota familia inhabitabit &c. A. was a foreigner and was chosen one of the common council (out of which the bailiff must be chosen) and afterwards was chosen bailiff but being refused to be sworn brought a mandamus to be sworn and admitted bailiff; per Holt Ch. J. the defendant ought to have returned this *special matter* and not (as he had done) non fuit electus: Carth. 227. Pasch. 4 W. & M. B. R. Vaughan v. Lewis.

8. In case of a mandamus to a corporation it is usual for the mayor to sign it, though not legally necessary, therefore let him sign it; per Holt. Comb. 324. Pasch. 7 W. 3. B. R. The King v. Mayor &c. of Colchester.

against the corporation or the procurer; per Holt Ch. J. Comb. 422. Hill. 9 W. 3. B. R. Lid-
leston v. Mayor of Exeter.—* S. C. and P. 12 Mod. 126. For before the statute of York, the she-
riff need not have set his hand to any return.

* Neither band or seal is necessary, but for false return, ac-
tion lies

9. A mandamus was directed majori, ballivis & omnibus principalibus burgensibus burgi de A. (except R. and S.) setting forth the constitution and that R. and S. were capital burgessees chosen by the commonalty to stand and serve for mayor for the ensuing year; and that they were to choose one of them, ideo they were commanded to elect one of them accordingly; they returned the statute 13 Car. 2. sess. 2. cap. 1. and that within 20 years, prox. post. 2 March 1663. R. and S. fuerunt electi bur-
genses principales, and within a year before their election had not received the sacrament, per quod electio eorum vacua devenit & non sunt principales burgeses; and this return was held naught: 1st. The Court considered it without the last words, (et non) &c. and as to that the Ch. J. said, the writ supposes them to be burgessees, and so the Court must intend them, and this is not answered by the special matter of the return, which shews only that he was once elected, and that was a void election; whereas he might qualify himself and be chosen again, and here is nothing to exclude the intendment of a subsequent election, which is according to the supposal of the writ. 2dly. The Court considered it with the last words, and held the (et non sunt principal' burgeses &c.) to be only part of the conclusion or inference; and the Ch. J. said, the law requires the most exact * certainty in these cases; because the party cannot traverse nor interplead, and it is not enough to offer a matter, so that the party may be able to falsify it in an action; but the matter must be so alleged that the Court may be able to judge of it and deter-

Carth. 499.
* The reason why a return to a mandamus requires the utmost certainty, the law allows of, is not only that the party may have sufficient ground his action upon, if false; but to the end the Court might know what judgment to give upon it. in case it were demurred upon, and because it cannot be helped by pleading, per Holt Ch. J. 12 Mod. 401. Pasch. 12 W. 3. The King v. Vill

de Abingdon.—Returns are to be kept to the same strictness since the 9 Annæ. 20. as before.—10 Mod. 108. Mich. 11 Annæ. B. R. in Case of the Queen v. Mayor &c. of Pomfret.

mine; whether it be a sufficient cause, or not; if the matter set forth in this return, had been so alleged in a plea in bar, the plaintiff might have replied a subsequent election; ergo, this return is uncertain; for there might have been a subsequent election. 2 Salk. 432, 433. Pasch. 12 W. 3. B. R. The King v. the Mayor &c. of Abingdon.

10. If a mandamus, alias & pluries be issued, a return in strictness ought to be to the pluries; because the party is in some sort of contempt for disobeying the two first writs; yet if there be no damage to the party a return to the original mandamus may be filed. 11 Mod. 265. pl. 4. Hill. 8 Annæ. B. R. Anon.

11. To the return of a mandamus *to restore* H. to the office of town clerk two exceptions were taken; 1st. That they said *that such a year of Queen Elizabeth, and long before they were a corporation*; and so did not intitle themselves by prescription, which is ever time out of mind. 2dly. It is not returned that the town clerk was actually chosen annually, but only *that he was annuatim eligibilis*, whereas time and usage are necessary to prescription. The first exception was disallowed, because it was only failing in matter of surplusage; but the Court held the second exception good; for the office of town clerk is an office for life, unless restrained by charter or prescription which ought to be shewn upon the return, but this is not done; besides, though he be annuatim eligibilis, he may continue town clerk, and will do so till they choose another; but this does not appear to be done, the exception therefore is good for both reasons. If the return had been *eligibilis pro uno anno tantum* his office would have expired at the end of the year, whether they had chosen another or not, but otherwise as this return is. 10 Mod. 146. Hill. 11 Annæ. B. R. The Queen v. the Corporation of Durham.

12. A repugnant and contradictory return is naught. 10 Mod. 107. Mich. 11 Annæ. B. R. The Queen v. Mayor &c. of Pomfret.

* Sid. 286. Basset's Case.

13. It is no good return that the *office is full of another person*; for a mandamus * gives no right, it only puts the party in a way to bring his action and try his right. Gibb. 195. Hill. 4 Geo. 2. B. R. The King v. Ward.

14. Upon a mandamus for a deputy register of the Spiritual Court it was returned, that there was a *contest before the delegates for this office not yet determined*, and for that reason that the *delegates had inhibited the defendant not to admit any person whatsoever to the said office, before the said suit was determined*; but the return was held not good. Gibb. 195. Hill. 4 Geo. 2. B. R. The King v. Ward.

(S) Return. *By whom it must be, or may be made, and when.*

1. **A** Mandamus was granted to the mayor &c. of Norwich; it was moved, that the *sense of the mayor differed from the majority of the corporation, and that he would execute the writ, whereas the corporation were for returning an excuse &c.* And they prayed, that the mayor might be ordered to deliver the writ to the rest of the corporation; sed non allocatur; for he is the head and principal, and take your course against him. 2 Salk. 432. Hill. 11 W. 3. B. R. The King v. the Mayor &c. of Norwich.

2. Mandamus was *to the mayor, bailiffs, and burgeses, of the town of Abingdon*; the mayor made a return, and brought it into the Crown-office, intending to move to have it filed; and now a motion was made to stay the filing of it, upon suggestion, that this return was made by the mayor, *and minor part of the bailiff and burgeses*, and against the consent of the greater number, who would have obeyed the writ, and therefore they prayed they might disavow this return and put in another. And per Holt Ch. J. where a writ is directed to a single officer, as a sheriff, and a return is made by a stranger without his privity, he may any time that term, wherein the writ is returned, come in and disavow it, but not after the term. Dy. 182. But in this case, where the writ is directed to several, and the mayor, who is the most principal and proper person, returns and brings in the writ, it is not fit that we should examine upon affidavits, whether there was the consent of the majority: we will take it, and leave you to punish the mayor for this misdemeanor if he be guilty; for it is a great crime, which will not only merit a heavy fine, but a peremptory mandamus will be granted, if the return be falsified. If they were all equal parties, this might be another case: the return was filed, and at the same time leave was given to file an information against the mayor. 2 Salk. 431. Mich. 11 W. 3. B. R. The King v. the Mayor &c. of Abingdon.

If the return of a
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mandamus be made by a mayor, the Court cannot refuse it, because he is the principal officer to whom it is directed.
Carth. 499.
Mich. 11 W. 3. B. R. The Case of Abingdon town.—
Return ought to be by the mayor with the consent of the major part of the corporation.
12 Mod. 308. Mich. 11 W. 3. The King v. the Borough

of Abingdon.—Mandamus directed to the mayor and burgeses, but returned only by the mayor is good. Comb. 41. Hill. 2 & 3 Jac. 2. B. R. Powell v. Price.

3. 9 Anne. cap. 20. §. 1. *Where any writ of mandamus shall issue to admit or restore any burgeses or officers of corporations, such persons, who by law are required to make return, shall make their return to the first writ of mandamus.*

§. 6. *It shall be lawful for the Queen's bench, courts of sessions of counties palatine, or the grand sessions in Wales, to allow to such persons, to whom any writ of mandamus shall be directed, or to the persons who shall prosecute the same, such convenient time to make a return,*

In cases which are not within this statute, a rule may

now be made for the return of *a return, reply, rejoin, or demur, as to the said Courts shall seem just.*

a mandamus at a day certain. Gibb. 4. Mich. 1 Geo. 2. B. R. The King v. the Russia Company.—A rule was made, that where a mandamus went above 40 miles, the return shall be at least 15 days, and where under 40 miles 8 days at least. 11 Mod. 64. Mich. 4 Ann. B. R. Anon.

4. 11 Geo. 1. cap. 4. s. 9. *Where any writ of mandamus shall issue out of the King's Bench, in any of the cases mentioned in this act, the persons, to whom such writ shall be directed, shall make their return to the first writ.*

(T) Return traversed, and of taking Issue on it.

8 Mod. 101. in Case of the King v. Mayor &c. of Carlisle. 1. 9 Anna. cap. 20. s. 2. *As often as any mandamus shall issue out of the King's Bench &c. and a return shall be made, it shall be lawful for the persons suing such mandamus to plead to, or traverse all, or any material facts contained in the return to which the persons making return shall reply, take issue, or demur; and such proceedings shall be had therein, as might have been had, if the persons suing such writ had brought their action on the case for a false return; and if issue shall be joined on such proceedings, the persons suing such writ may try the same in such place as an issue joined in such action on the case might have been tried.*

[214] (U) Return. Ill or false, or no Returns. How punished.

1. **I**N case of a mandamus out of Chancery, *no attachment lies* for not returning it *'till the pluries*, because that is in nature of an action to recover damages for the delay; but upon a mandamus out of this Court, the first writ ought to be returned; yet an *attachment is never granted without a peremptory rule to return* the writ, and then it goes for the contempt. And a peremptory rule was made. 2 Salk. 429. Hill. 9 W. 3. B. R. Mayor of Coventry's Case.

2. A mandamus was returned, and there was neither the hand of the mayor, or seal of the corporation to it; and per Cur. it is well enough without it; before the statute of York, the sheriff need not have set his hand to any return. If the return be false, you may bring your *action against the whole body politick, for making a false return, and against a peculiar person for procuring a false return.* 12 Mod. 126. Trin. 9 W. 3. Lydston v. Mayor and Bailiffs of Exeter.

If a frivolous return be made, and purposely to avoid the justice of the Court an attachment shall go. 3. If an officer make an illegal return, he shall be *amerced, and we will not allow him to quash the ill return and make another; and if upon disallowance of one return, he makes a second bad, an attachment shall go; per Holt Ch. J.* 12 Mod. 410. Trin. 12 W. 3. Anon.

an attachment shall go. 8 Mod. 336. Mich. 11 Geo. The King v. Robinson.

4. Information against the defendant, late major of the Bath, for a *false return* to a mandamus for electing a *town clerk* in the room of Bushel; the *return was*, that *before the coming of the writ J. S. had been duly chosen and sworn into the office*; it appeared upon evidence at the trial, that the right of election was in 30 of the common councilmen, that they were summoned by the mayor, and that 28 did meet; that there were 3 candidates; that one of them had 2 votes, and another had 13 votes, and that the 3d had the mayor and 12 more votes for him; and that the mayor pretending he had a *casting-vote* declared his man duly chosen, and at another Court swore him; it was ruled by Holt Ch. J. that the copy of the writ, and return of it in the Crown-office, is sufficient evidence to prove this to be the mayor's return; that though it is requisite to deliver the writ to the mayor, as being the head of the corporation, yet it is not necessary to prove the delivery of it to him, no more than it is to prove the delivery of a writ to the sheriff; that the mayor or any other officer of a corporation, hath of common right no casting vote; it is true such a thing may be either by prescription or charter; that if there is an equality of votes, and they cannot agree, they must be brought up in contempt, and be committed till they do agree, that is till a majority do agree; that an action for a false return may be brought against all the corporation, or any particular member thereof. The mayor was found guilty. Nels. Abr. 1155. Mandamus (D) pl. 13. cites Mod. Cases 152. The Queen v. Chapman.

5. 9 Annæ. cap. 20. s. 3. *If damages be recovered by virtue of this act, against any persons making a false &c. return to the writ, they shall not be liable to be sued in any other action for making such return.*

6. Where a mandamus was directed to the church-wardens of W. to restore A. to the *office of sexton*, and served upon the late church-wardens after their office was expired, and a rule being made to shew cause why an attachment should not go, for not obeying the mandamus, and the whole matter being disclosed by affidavit, the Court allowed as a good reason for their not returning the writ, that *they, at the time of the writ delivered to them, were not church-wardens.* 3 New. Abr. 541. cites Trin. 5 Geo. 2. The King v. Wrexham Church-wardens.

7. If an *attachment issues* for not returning a mandamus, and the *sheriff*, who is to serve the process, *makes bail* thereupon, this is such a misdemeanor, for which an attachment will be granted against him; for these are not like attachments in Chancery for want of an answer, which are only as attachments of process, but are writs on contempt, in nature of executions, and so notailable by the sheriff. 3 New. Abr. 542. Mich. 9 Geo. 2. The King v. Baskerville, sheriff of Shropshire.

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(W) *Peremptory* Mandamus; granted in what Cases.

1. **M**andamus to restore Shaw to the place of one of the burgeses of Wilton, and after argument on both sides a peremptory mandamus was granted; because the *crime* for which they removed him, *was not well alleged in the return.* 12 Mod. 113. Hill. 8 W. 3. The King v. Shaw.

2. An *action* was brought for a *false return*, and a *verdict* was for the plaintiff, and a peremptory mandamus was moved for and opposed, because it was a hard verdict &c. And per Holt Ch. J. when an action is brought for a false return, and that is falsified, we cannot refuse a peremptory mandamus. Sed nota, this *motion cannot be made till 4 days are past after the return of the postea*; because the defendant has so long to move in the arrest of judgment. 2 Salk. 430, 431. Trin. 11 W. 3. B. R. Buckley v. Palmer.—Pasch. 12 W. 3. B. R. The Case of the City of Exeter.

So if a writ of error had been brought it would not stay the peremptory mandamus.

3. A *bill of exceptions* being mentioned in time or not is no cause to stop a peremptory mandamus. But if a *motion for a new trial* had been made, it would have hinder'd it, and a new trial would have been granted for refusing evidence. 11 Mod. 175. Trin. 7 Ann. B. R. Wright v. Sharp.

Mod. 175. Trin. 7 Ann. B. R. in Case of Wright v. Sharp.

See (A) pl. 10. Dean and Chapter of Dublin v. Dowgatt.

4. 9 *Anna. cap. 20. §. 2.* enacts, That *where any mandamus shall issue to admit or restore any burgeses &c. and a return shall be made, and a verdict be found for the persons suing such mandamus, or judgment be given for them, a peremptory mandamus shall be granted without delay, as if such return had been adjudged insufficient.*

(X) *Exceptions* to the Writ, and at what Time.

1. **C**ASE &c. in C. B. upon a false return of a mandamus, and upon a demurrer to the declaration the plaintiff had judgment, and the Court of B. R. was moved for a peremptory mandamus, but it was denied; for, per Holt Ch. J. every mandamus *recites the fact prout nobis constat per recordum*; and ask'd, how can we say that in this case we cannot take notice of the records in C. B. And said, that they might have brought their action in B. R. 2 Salk. 428. Mich. 8 W. 3. B. R. Anon.

5 Mod. 314. S. C. — Sid. 31. Town-clerk of Nottingham's Case.

2. Upon a motion to shew cause why an attachment shall not go for not making a return to an alias mandamus, it was excepted to the writ, because the clause (*vel causam nobis significetis*) is omitted, and so it is a peremptory writ without the liberty of being heard; and for this cause they would have excepted to the writ,

writ, but the Court would not allow it, and said that they might make a return, and then except to the writ; for they have nothing before them 'till a return; and so they directed in the case of ST. JOHN'S COLLEGE IN CAMBRIDGE, and tho' no pluries had issu'd in this case, yet per Cur. in extraordinary cases, where they are satisfied of the irregularity and disorder of the place, they would require a return to an alias. And after, the Court ordered them to take a pluries with the usual clause, and discharged the rule, and gave time to make the return. Skin. 669. Mich. 8 W. 3. B. R. The King v. Owen.

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3. Mandamus to the justices in sessions in the county of W. to admit one Peat to the oath of allegiance, and to subscribe the declaration according to the act of toleration in order to qualify him to teach in a dissenting congregation, and it was granted; he ought to suggest whatever is necessary to intitle him to be admitted, and if that be not done, or if it is false, it will be good matter to return on the mandamus. Nels. Abr. 1148. Mandamus (A) pl. 46. cites Mod. Cases 310. Peat's Case.

(Y) Judgment. And what shall be recovered.

1. 9 Ann. cap. 20. f. 2. **E**NACTS, That if on a return to a writ of mandamus a verdict be found for the persons suing the mandamus, or judgment be given for them, they shall recover their damages and costs to be levied by *capias ad satisfaciendum, fieri facias, or elegit*; and in case judgment shall be given for the persons making such return, they shall recover costs.

(Z) Discretionary Power of the Court in granting or refusing it.

1. Since the statute 11 Geo. 1. for obliging corporations to elect officers, it hath been held, that this Court has a discretionary power of refusing a writ for that purpose, but may first receive information about the election, and if dissatisfied about the right, may send the parties to try it in an information. 3 New. Abr. 540. Hill. 8 Geo. 2. The King v. the Mayor and Burgeses of Tintagel in Cornwall.

Manor.

(A) *How* it may be.

Br. Com-
prise &c. pl.
34. cites 5
H. 7. 38.

[1. **A** Man *cannot make a manor at this day*, tho' he makes a gift in tail reserving a tenure and suit to the Court. Because tho' he may create a tenure, yet he *cannot create a court*; for a Court Baron cannot be without *continuance time out of mind*. 33 H. 8. Brook Nient Comprise. 31 & ibidem 34, 35 H. 8. Brooke Tenure 102.]

2. The King cannot *create a manor at this day*. Arg. Show. 142. cites Le. 26. Pasch. 27 Eliz. C. B. Marsh v. Smith.

3. A manor may be tho' but *one tenant*. As if all the lands which are held of the manor escheat to the lord, except the lands of one tenant, this tenant holds the lands of the lord of the manor; and the feigniori between him and his tenant is not extinct; but it remains. Per 3 justices. And. 257. Trin. 30 Eliz. in Case of Long v. Hemming.

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(A, 2) *Incident* to it. What.

1. **I**T was doubted whether a manor, quatenus a manor, has a Court Baron to hold pleas; it is true, it has *eo nomine a Court-Baron to have suit*; but it was doubted, whether to *hold plea without prescription*. 12 Mod. 494. Pasch. 13 W. 3. Holm v. Hunter.

(B) What Thing may be Parcel of a Manor.

Br. Com-
prise &c. pl.
23. & 26.

cites S. C.
Jo. 235. Br.
Prescrip-
tion, pl. 51.

cites S. C.

—Jo. 234.

Fawlkner v.

Bellingham.

—No rent

can be par-

cel of a manor,

but rent service.

Per Popham solicitor.

Arg. Mo. 166.

—If a *mesuagium* be-

comes a rent by *surplusage*,

those that are now seck

and sometimes were service

are part of the

manor; but a rent charge

cannot be part of a manor.

Co. Litt. 150. b.

[1. **A**N annuity cannot be parcel of a manor. 22 E. 4. 44.]

[2. A rent seck may be parcel of a manor. 22 Aff. 53.]

[3. A rent seck may be parcel of a manor; for it *may have a good commencement*. For perhaps, the lord released to the tenant the feigniori reserving the rent, or the lord paramount purchased the demesne, in which cases the rent is parcel of the manor. 31 Aff. 23. adjudged.]

[4. So before time of memory, the lord might alien parcel of the manor to hold of the lord paramount reserving to himself a certain

A rent-
charge may
pass as par-

a certain

a certain rent, and this rent *used always after to pass with the manor*; this shall be parcel of the manor. 22 Aff. 53. per Thorp.] *cel of a manor by reputation, as by shewing that the bailiffs of the manor had always received it as parcel of the said manor; and as bailiffs of the said manor had accounted for it as parcel of the said manor; and that the lessees of the said manor had enjoyed the said rent as parcel of the said manor. Adjudged that this would have been good matter to induce a reputation to have incorporated the said rent with the manor. Le. 15. Pasch. 26 Eliz. B. R. Foreman v. Bohun.——Mo. 190. S. C. debated but no judgment.——A rent charge by prescription may be parcel of a manor, and may pass without the words cum pertinentiis; as of rent charge granted with the manor to one coparcener, for owelty of partition; per Mead and Wyndham J. But Anderson and Fenner serjeants contra. Godb. 3. pl. 4. Pasch. 12 Eliz. in C. B.——It is a good title in assise of rent, that the plaintiff and all lords of the manor of D. have been seised of the rent time out of mind, as parcel of the manor; per Hill, to which Hankford agreed. Br. Titles, pl. 11. cites 12 H. 4. 8.*

[5. So between two coparceners upon partition of two manors a rent for equality may be assigned to one with a manor, and this rent has so continued time out of mind in the hands of the lords of the manor, this rent shall be said parcel of the manor. 22 Aff. 53.] *Br. Comprise &c. pl. 37. cites S. C. and yet it is a rent in gross.*

6. A *castle* may be parcel of a feignior. Br. Brief, pl. 165. cites 7 H. 6. 36.——It may be parcel of a manor. Br. Comprise &c. pl. 35.

7. In scire facias to execute a fine of the manor of D. or hundred of Pole demanded judgment of the writ; for the hundred is parcel of the manor, and because the fine was as above, and he cannot vary from the fine, the writ was awarded good. Brook says, and so see it is admitted, that a *hundred* may be parcel of a manor, but it seems, that it may be appendant to the manor but not parcel. Br. Variance, pl. 84. cites 72 H. 6. 1, 2.

8. In quare impedit it was greatly argued, if an *advowson* may lie in tenure; and if it may be parcel of a manor, or only appendant; for it seems to me, that it *may be parcel appendant, but not properly parcel*. Br. Comprise &c. pl. 34. cites 5 H. 7. 38. *Br. Manor, pl. 4. cites S. C. and Brook says, see 8 H. 7. 1. that Leet may be parcel of a manor.*

9. *Tithes* cannot be *parcel* of a manor, and tho' the King has [218] tithes, he has them not as a lay-fee. Cro. E. 293. Hill. 35. Eliz. B. R. Sherwood v. Winchcomb. *S. C. cited Cro. E. 599. But to have decimam*

garbam, or cumulum garbarum seu granorum of all his tenants within his manor may be parcel. Cro. E. 5 Mich. 99. 39 & 40 Eliz. B. R. Pigot v. Herne.——Ley. 45. in Stephens's Case.

10. *Catalla felonum* cannot be *parcel* of a manor. Cro. E. 293. Sherwood v. Winchcomb.

11. A *vicaridge* may be well *parcel* to a manor; per Coke Ch. J. 3 Buls. 91. cites 5 R. 2.

12. A *warren* is not parcel, nor any member of a manor, but it may be *appertaining*, but that is *by prescription*. Cro. E. 547. Hill. 39 Eliz. C. B. in case of Bowlston v. Hardy.

13. A *manor* may be *parcel* of a manor, and held of another manor, as 32 H. 6. 9. 13 H. 7. 19. b. 6 E. 3. quare impedit. 34. And that by the *escheat of the manor* it is become parcel of the *S. P. Br. Comprise, pl. 32. cites 32 H. 6. 9.*

—S. P. Le. 23. in Case of Marsh v. Smith, cites S. C.—*Tho' a manor may be parcel of another manor, yet it can not be parcel of another manor and both to be in esse at the same time; for being liberties and franchises of the same nature non possunt stare in simul. And a fortiori, such manor held by copy of another manor cannot be a manor to hold a Court Baron; for he can have no franktenants to hold of him; for a copyhold manor is not capable of an escheat of freehold. For that which comes instead of another, ought to be of the same nature, and then the freehold escheated, should be copyhold which is repugnant and impossible. Yelv. 191. The King v. Staverton.*

the manor again, and then *ceases to be a manor*; for by the escheat the services are extinct, and by consequence, the manor escheated remains only to be a manor. But *Court Baron cannot be held after the escheat, but a Court only*; for as *without two franktenants* it ceases to be a manor, so if it *wants services*; for it must be part in demesne and part in service. Yelv. 190. Mich. 8 Jac. B. R. The King v. Staverton.

14. It seems that *lands held of one manor cannot be given to be held of another manor*; but *lands which are parcel of any manor may*; per Windham J. Godb. 101. pl. 118. Mich. 28 & 29 Eliz. C. B.

(B. 2) Appendant. What may be Appendant to a Manor.

1. **A** *Franchise* may be appendant to a manor, and may pass by a feoffment thereof cum pertin. *Contra* of a *franchise in gross*, which a man has by grant; for this cannot be granted over. Br. Quo Warranto, pl. 6. cites 6 E. 2. 7. It. Canc.

2. A vicarage may be appendant to a manor; per Coke, who said, he had seen one so. But 5 R. 2. Quare Imp. is adjudged contra. Roll. R. 237. Mich. 13 Jac. B. R. in Case of the King v. Bp. of Norwich.

(C) What shall be said Parcel of the Manor,

As if A. has a manor in the county of W. and B. holds lands of the same manor in the county of D. by rent and services, this rent and services are parcel of the manor, and in demanding of the manor, he shall demand it in the counties of W. and D. where he shall make surmise. Br. Manor, pl. 2. cites 22 H. 6. 53.—Br. Estopple, pl. 2. cites S. C.—S. P. Br. Comprise, pl. 30. cites 8 E. 4. 20.—S. P. But per Eyres J. The rent may be parcel of the manor, and so may the services, tho' the land is frank-fee, and whatever is holden of the manor is not part. 12 Mod. 13. Parker v. Winch.—Nothing is part of the manor but demesnes and services, and not the lands of the tenants, and the enfranchisement only alters the manner of their tenure. Hard. 131. in Case of Rich v. Barker.

[219] 1. **T**HE land held in fee of a manor is not parcel of the manor; but the rent and services issuing out of it are parcel of the manor. Brook Manor. 2 Collect. in abridgment. 22 H. 6. 53.]

2. Tenant in tail of a manor discontinues 3 acres thereof for his life, and after discontinues the manor, the issue, in formodon of the manor, shall make an exception of the three acres; and therefore it seems that it is parcel of the manor in reversion severed before the

the time, but quere, if it be not only parcel of the manor in right, and not in reversion nor in possession. Br. Comprise, pl. 36. cites 19 E. 2. and Fitzh. Bre. 845.

3. If a manor and 200 acres of land descend to two parteners, who make partition, and one has the said 200 acres, and the other has the manor and 10s. rent per ann. for equality of partition, which 10s. has gone with the manor time out of mind &c. Inasmuch as this was an antient partition, there, whosoever has the manor, shall have the rent, and so it seems, that by the continuance the rent is become parcel of the manor. Br. Partition; pl. 37. cites 22 Aff. 53. per Thorp.

4. If a manor be held of another manor, and after escheats, this is parcel of the first manor, and the name is not altered by it. Br. Comprise &c. pl. 32. cites 32 H. 6. 9. and Fitzh. Barre.

5. If a lease for life, or gift in tail, is made of parcel of the manor, there during this interest the land is not parcel of the manor in possession; but the* reversion is parcel of the manor. Br. Comprise &c. pl. 19. cites 7 H. 7. 8.

Br. Comprise &c. pl. 9. cites 36 H. 6. 19. 20.—Br. Comprise

&c. pl. 27. cites Lit. chapt. of attornment fol. ultimo accordingly, and that an entry into the manor is no disseisin of the parcel leased, if the lessee be not ousted; and so it seems that it does not pass by a grant of the manor; for it is severed for the time.—Lands in lease for years are not parcel of the manor during the continuance of the lease, but the reversion thereof is parcel. Per Cur. 5 Mod. 246. Winter v. Loveday.—Ibid. 379. 382. S. C.—* S. P. and by the grant of the manor the reversion passes by attornment of the donee or lessee. Co. Litt. 324. b.—But if the lord makes a gift in tail or lease for life of the whole manor, excepting Black-acre parcel of the demesnes of the manor, and after he grant away his manor, Black-acre shall not pass; because during the estate tail, or lease for life it is severed from the manor. Co. Litt. 324. b.—And so note a diversity, that a reversion of part may be parcel of a manor in possession; but a part in possession cannot be parcel of the reversion of a manor expectant upon any estate of freehold. Co. Litt. 325. a.—But if a man makes a lease for years of a manor, excepting Black-acre, and after grants away the manor, Black-acre shall pass; because the freehold being intire, it remains parcel of the manor, and one præcipe of the whole manor shall serve. Co. Litt. 325. a.—Whereas in case of the gift in tail, or lease for life excepting any part, there must be several writs of præcipe, because the freehold is several. Co. Litt. 325. a.—Pl. C. 103. b. Arg. in Case of Fulmerstone v. Steward.

6. And where disseisin or feoffment upon condition is made of parcel of the manor, this is not parcel of the manor till a regress. Br. Comprise &c. pl. 19. cites 7 H. 7. 8.

7. *Infra manerium* is within the proper lands of the manor, and not the tenancy. Ben. 112. Marg. Mich. 3 & 4 Eliz.

8. Lord, mesne and tenant; mesne purchases the seignior, and afterwards purchases the tenancy; now the tenancy is become parcel of the manor. Savill. 21. Pasch. 24. Eliz. Hutton v. Gifford.

9. *Advowson appendant*, as the soil upon which the church is built, is parcel of the manor; per Anderson Ch. J. Le. 28. Pasch. 27 Eliz. C. B. in Case of Marsh v. Smith.

10. If I grant Black-acre (which is parcel of the manor of D.) and the manor of D. there Black-acre shall pass as parcel of the manor; per Anderson Ch. J. who said he could shew an authority, which Periam J. granted; because it inforced the first grant. Godb. 130. Mich. 28 Eliz. C. B. in Case of Green v. Harris.

11. Land incroached out of the waste of a manor is still belonging

ing to, and a parcel of the manor; per Lee and Dodderidge J. Godb. 411. Trin. 21 Jac. B. R. in Sommers's Case.

- [220] 12. If a *tenancy escheats* to the lord, it becomes part of the manor; but if the *lord purchase* part, it is only holden of the manor, and not part of it; but the *rents and services* are part. Per Holt. 12 Mod. 138. Mich. 9 W. 3. Anon.

But the freehold of copyholds is part of the demesnes of the manor, and so is the pleading. Arg. Skin. 192. Trin. 36 Car. 2. C. B. in Case of Lemon v. Blackwell.

13. The *freeholds themselves* can never be parcel of the manor, but it is *the services*. Per Holt Ch. J. 11 Mod. 53. pl. 28. Pasch. 4 Ann. B. R. Quære.

and so is the pleading. Arg. Skin. 192. Trin. 36 Car. 2. C. B. in Case of Lemon v. Blackwell.

(C. 2) Demesnes of the Manor. *What.*

1. **BOROUGH**, Burgus is a thing in *demesne*. Kelw. 76. Mich. 21 H. 7.

Copyholds are as the demesnes of the manor, and are

the lord's freehold. Cro. J. 559, in Case of Pimmock v. Hilder.—S. P. because the tenancy being at the will of the lord, the lands are supposed to be always in his hands, but in vulgar acceptation it is otherwise. 5 Mod. 246. Trin. 8 W. 3. Winter v. Loveday.—By grant of the demesnes the copyhold will pass. 2 Salk. 538. S. C.—But otherwise in the King's Case. 1 Rep. 46. b. in Altonwood's Case.—2 Roll. R. 236. Smith v. Reynard.—All *copyholds* are demesnes; for it is an *inseparable quality* of every copyhold, that it was time out of mind parcel of the manor. Admitted. Carth. 428. Mich. 9 W. 3. Winter v. Loveday.

3. The *freehold of the copyholds* is part of the demesne of the manor, and so is the pleading. Arg. Skin. 192. Trin. 36 Car. 2. C. B. in Case of Lemon v. Blackwell.

(D) Parcel. *Severance* of the Manor.

- [1.] IF *baron and feme seised* of a manor in right of the *feme lease* an acre to another for life, yet the *reversion* continues parcel of the manor; (for this is not any *discontinuance*, the feme joining in the lease.) 18 E. 3. 39. 18 Aff. pl. 2.]

So in the King's Case. Het. 14. in Case of Hartop and Tuck v. Dalby.

- [2. If a man *leases all the demesnes* of a manor for life rendering *rent*, yet the *reversion* is parcel of the manor, so that it shall pass by grant of the manor. D. 6. 7. El. 10.]

Pol. 121.

- [3. If a man *grants an advowson appendant for life*, the *reversion* is parcel of the manor. 5 Rep. 11. b. *Ive's Case*. 38 H. 6. 38.]

Het. 14. Hartop and Tuck v. Dalby,——Jenk. 311. pl. 91.

Het. 14. in Case of Har-

- [4. But if a man *lease* the manor for life, excepting the *advowson*,

son, the advowson in possession cannot be parcel of the reversion of the manor expectant upon the estate for life. 5 Rep. 11. b. *Ive's Case*. 38 H. 6. 38.]

top and
Tuck v.
Dalby. Held
to be only a
disappen-

dency pro tempore.——Jenk. 310. pl. 91.

[5. But otherwise it would be in this case, if the lease of the manor was *for years only*. 5 Rep. 11. b. *Ive's Case*. Contra Com. 104.]

[6. If *baron and feme*, seised of a manor in right of the feme, lease an acre to another for life, and after they grant the reversion thereof in fee to the same lessee, it seems, that this severs the acre from the manor during the continuance of this estate. 18 E. 3. 39. 18 Aff. pl. 2.]

[221]
If baron
and feme sei-
sed of a ma-
nor in right
of the feme,
make feoff-

ment of one acre to another, by which it is severed from the manor, and after make feoffment of the residue to him also, and after levy a fine, sur release, to the feoffee of the said manor; this extinguishes the right of the feme in the acre severed from the manor; for this was parcel of the manor in right as to the feme who had right to recover it by a *cui in vita*. 18 E. 3. 39. 18 Aff. pl. 2. Curia. See Release (C. a) pl. 1.

[7. If a man leases 10 acres of the demesnes of a manor for 10 years rendring rent, and after demises the entire manor by the name of the manor &c. for 20 years to commence at a day to come, an interest of 10 years in the 10 acres shall pass to the lessee of the manor after the expiration of the first 10 years, tho' no attornment be had by the first termor; for this passes as parcel of the manor, and not as a reversion; for the 10 acres never were severed from the manor; but the franktenement and fee of it remain parcel and member of the gross, and body and name of the manor. Dy 18 El. 350. 18. Com. Bracebridge 423.]

S. P. Benl.
283. pl.
286. Mich.
17 & 18.
Eliz. Haley
v. Round
and East.

8. In assise, the baron and feme was seised of the manor of D. in right of the wife; they lease four acres to A. for life, and after the baron grants the reversion to F. in fee. A. attorn'd, and after they alien'd the manor to F. in fee, and the baron and feme levy'd a fine sur consance de droit come ceo &c. to F. of the manor; the baron dies, and after his death, the feme makes contention for the four acres, because as she thought they were severed by the lease and did not pass by the fine; and by the opinion of the whole Court, they were parcel of the manor in reversion, and passed by the fine, and were parcel of the manor as to the feme; quod nota. Contra tit. Attornments in * Littleton, fol. ultimo & quere. Br. Fines pl. 76. cites 17 E. 3. 52. and 78. 17 Aff. 17.

* Co. Litt.
S. 191. &
pag. 325. &
the notes
there.

9. The lord of a manor, wherein there were copyholders for life, made a lease of a copyhold tenement, called Harris Farm, to A. and B. for eight years to commence after the death of the lord and his wife; and by the same indenture they leased the whole manor to A. and B. as before; the copyholders of Harris's Farm surrendered, and then the lord granted the copyhold to another to hold according to the custom of the manor; afterwards he and his wife died, upon whose death the lease made by the lord to A. and B. did commence; A. entered and

T

fold

fold his part, and died. B. entered on the whole as survivor, and the copyholder entered on him; the question was, whether the survivor should have this Harris's Farm, as in gross, and not as parcel of the manor by the last lease. Adjournatur. Godb. 127. Mich. 28 Eliz. C. B. Green v. Harris.

See (D) (P)
(Q).

(E) Severance.

[1.] *If a bishop be seised in fee in right of his church of a manor, and after the bishop makes a lease for life of a tenement, not warrantable by any statute, yet the reversion thereof continues parcel of the manor, and will pass by name of the manor with attornment of the lessee. For this was not any discontinuance, as if tenant in tail had made such lease. Pasch. 11 Car. B. R. between Walter and Jackson. In writ of error upon judgment in Bank. Said per Barkley, that it was so adjudged in Bank in this case, and the Court then agreed it, and so affirmed the judgment. But it was not enter'd till Trin. 11 Car. Intratur Hill. 10 Car. Rot.]*

[222] [2. *But if tenant in tail be of a manor, and he makes a lease for life of a tenement not warrantable by the statute 32 H. 8. this has severed the reversion of this tenement from the residue of the manor, so that the reversion shall not pass by the grant of the manor with attornment of the lessee; because by the lease this was a discontinuance, and a new fee gain'd, which was not parcel of the manor. Pasch. 11 Car. B. R. in the said Case of Walter and Jackson; said per Barkley to be agreed in Bank.]*

[3. *If the lord of the manor releases to the tenant of the manor the seigniorie saving the rent, this rent shall be parcel of the manor. 31 Aff. 23.]*

[4. *So if there be lord and tenant of a manor, and the lord purchases a tenancy held of the manor, by which the seigniorie is extinct, between the tenant of the manor, who is the mesne as to this, and the tenant of the tenancy; yet the surplus of the rent continues parcel of the manor to the tenant of the manor, who is the mesne. 31 Aff. 23.]*

5. *If a man holds by suit of mill of the manor of D. and the lord granted over his mill and suit, and dies, and the heir of the lord makes another mill; he shall have the suit; for the suit is to the manor, and not to the mill. Br. Grants, pl. 162. cites Fitzh. Assise 399.*

6. *A. seised of a manor had issue two daughters, and died seised; the daughters entered, and made partition of the demesnes only, but the services of the freeholders remained in common; one of the daughters took husband, and the husband and wife made a lease of the moiety of the manor to J. S. for years by parcel rendering rent; the lessee entered into the demesnes allotted by the wife of the lessor. The husband died, and the wife brought an*

an action of waste. Per Anderson, by the partition the *demesnes* are now become in gross, and sever'd from the manor. 1 Le. 204. Pasch. 31 Eliz. C. B. Thetford v. Thetford.

7. A manor may be granted, *parcel to be held by one tenure, and parcel by another*, and yet remain entire. Het. 14 Pasch. 3 Car. C. B. Hartop and Tuck v. Dalby.

(F) Destruction. What Act or Thing will destroy a Manor.

[1.] If all the franktenements of a manor escheat to the lord, or * the lord purchases them in fee, this extinguishes the manor; because there cannot be a manor without a Court Baron, and no Court Baron can be without suitors. 33 H. 8. Brook Nient Comprise. 31 admitted.]

* Fol. 122.

S. P. Br. Manor, pl. 5.—S. P. Br. Court Baron, pl.

22. cites 2 E. 6. ——— For lord of a manor cannot hold Court, nor do justice without two suitors. Ibid.

[2. So if all the franktenements of the manor except one escheat, or the lord purchases in fee all but one, the manor is extinct; because there cannot be a Court-Baron without two suitors. 33 H. 8. Nient Comprise Brooke. 31.]

S. P. Br. Manor, pl. 5.—S. P. and therefore one franktene-

ment only cannot make a manor. Br. Comprise, pl. 31. cites 33 H. 8.

[3. If upon a partition the demesnes are allotted to one parcener, and the services to the other, and after the demesnes descend to her who has the services, this shall be a manor again, and all suits and services shall be revived; for they were only suspended before. 12 H. 4. 25. b. Co. 6. 64. Finch. 18 H. 6. 26.

S. P. per Anderson, which Windham and Periam granted. Le. 204. in

Case of Thetford v. Thetford. —S. P. And. 257. Trin. 30 Eliz. Long v. Heming. —By a scoffment to A. of the demesnes, and afterwards a grant to A. of the services the court and manor are destroyed. Litt. R. 129. per Vernon J. —A. seised of a manor levies a fine of the demesnes; the manor is gone for ever, and though after the fine he is seised of his old estate again, yet he has it in another manor; for the fine being sur cognizance de droit come ceo &c. presupposes a scoffment. 6 Mod. 45. in Case of Ford v. Ld. Grey. —See (F. 2)

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4. Alienation of the manor house, which the lord had in possession, destroys not the manor, if the demesnes and services remain. Per Holt. 5. Mod. 382. Mich. 9 W. 3. in Case of Winter v. Loveday.

(F. 2) Manor in Reputation. What is.

See Grant, (H. 20)

1. EVERY manor consists of demesnes and services, and a fine sur grant and render of the services destroys the manor; yet it remains a manor in reputation. Per Holt. Ch. J. Skin. 661. Mich. 8 W. 3. B. R. The King v. Bishop of Chester.

(G) Making

See Copy-
hold (H)—

Dow Parti-

tion (H)—

And there-

fore it seems

that they

both shall

hold Court;

quære inde; for it was agreed for law in the Star-Chamber, that it is no manor if there be not two freeholders at least. Br. Manor, pl. 1. cites 26 H. 8. 4.

(G) Making of a Manor into two:

[1.] IF 2 coparceners make partition, and parcel of the demesnes and services is allotted to the one, and so other parcel to the other, they have two manors; because it is by act in law. 18 H. 6. 27. 26 H. 8. 4. Cook. 6. 64.]

2. In scire facias a fine was levied between R. and M. of two manors, by which M. acknowledged all his right in the two manors, viz. to be the right of R. come ceo &c. for which acknowledgment R. granted and render'd one manor to M. for life, with two parts of the other manor which N. held in dower, to hold one manor and two parts of the other manor to M. for life, the remainder, after his death, to R. in tail; and that after the death of A. the third part should remain to another; and so see a manor divided. Br. Fines, pl. 17. cites 43 E. 3. 11.

Cro. E. 38.

S. P. Per.

Anderson

and Wind-

ham J.

against

Periam J.

Morris v.

Smith and

Paget.—Ow. 138. S. C.—Grantee of the inheritance of copyhold for life cannot hold a customary Court to grant any new copy. Cro. E. 103. Per omnes J. and Barones in Cam. Scacc. Trin. 30 Eliz. C. B. in the Case of Melwich v. Luther and Ux.—443. Bright v. Forth.—6 Mod. 151. The Queen v. the Dutchess of Buccleugh contra.

Le. 26.

Marsh v.

Smith. S. C.

—Carel

was of opi-

nion, that

by force of

such grant

J. S. might

hold a Court

Leet in N. there being a leet within the manor of C. and that it might be well divided. Cro. E. 39. in Case of Morris v. Smith and Paget.—A. suffered a recovery of the manor, excepting N. in which were several copyholders for life. A Court was afterwards held at N. where a copyhold was granted for life to J. S. But such grant was held to be void; for there was no such manor as N. either before

[224] or now. Cro. E. 442. Mich. 37 & 38 Eliz. C. B. Bright v. Forth.—Per Anderson, if this severance had been of copyholds of inheritance, the copyholders and their heirs should have had it. But it can never be surrendered; for surrenders are by custom, and therefore they ought to be in the Court of the manor. And a surrender to the lord himself in his house, or out of Court, is not good. Quod Beaumont concessit, and judgment accordingly. Cro. E. 442, Mich. 37 & 38 Eliz. C. B. Bright v. Forth.

Ow. 138. S.

C. by the

name of

Morris v. Paget.—A manor is an intire thing, and cannot be severed. 6 Mod. 151. The Queen v. the Dutchess of Buccleugh.

5. A manor may be determined, divided and suspended. Per. Anderson Ch. J. Le. 27. Pasch. 27 Eliz. C. B. Marsh v. Smith.

6. A. seised in fee of the manor of M. extending into M. and N. and also of other lands in N. by his will devises the manor of M. to B. his eldest son and heir in tail, and his lands in N. to C. his younger son &c. Per 3 justices, and shall have that part of the manor of C. which lies in the town of N. 2 Le. 190. Mich. 32 Eliz. C. B. Sir Anthony Dennis's Case.

7. If I grant away the moiety of my manor, we shall both hold Courts. So if J. be disseised of a moiety, or the moiety be in execution by legit. Per Walmesley J. Goldsb. 117. pl. 15. Hill. 39 Eliz. Smith v. Bonfall.

8. A forcible entry by a stranger may be into the moiety of a manor, and that shall not be an entry into the other moiety; per Jones J. But it may be otherwise by parceners. Doderidge J. said, that before partition one parcener has *dimidium manerii*, and after *medietatem*. And yet inasmuch as a moiety has all the privileges of a manor, it is a manor and not the moiety of a manor after partition; and yet it may well be alleged in such case, that the entry was into the moiety of the manor, because that which is now a manor is but the moiety of a manor, and an exception taken to the contrary was held by the Court not to be of any moment. Lat. 224. Beverley's Case.

(H) Reviver. When a Manor is extinct, what Act shall revive it.

[1. IF coparceners of a manor make partition, whereby the services are allotted to the one, and the demesnes to the other &c. the manor is destroyed; yet if after one of them dies without issue, by which her part comes to the other, this shall be a manor again; because it was severed and re-joined by act in law. 12 H. 6. 25. b. Curia. 18 H. 6. 26. 6 Rep. 64. Finch's Case.]

Arg. And. 84. Het. 14. cites 38 H. 6. 36. — Le. 204. in Case of Thetford v. Thetford.

* It should be (4.)

2. If the King grants the demesnes of a manor for life, after lessee's death it is a manor again. Het. 14. in Case of Hartop v. Tuck and Dalby.

(H. 2) Seignior. Revived, after it has been in the Hands of the Crown.

1. IF lands escheat to the King, and he gives them tenend' de capitalibus dominis feodi per servitium debit. & de jure consequitur there the seignior of the subject of whom the lands were held before the forfeiture is amply revived, and the King by his patent excluded of any tenure or seignior. Arg. Mo. 162. cites 33 H. 6. 7. per Prisot.

The same law if the King enters for mortmain, and makes feoffment tenend' de capitalibus dominis feodi; the seignories are revived. Ibid.

2. If the King has land by forfeiture of treason; by this all tenures are extinct, as well of the King as of others; and there if

Br. N. C. 196. pl. 92.

if this land be after given to another by parliament saving to all others their rights, rents, services, &c. there the feignories of
 [225] common persons are not revived. 27 H. 8. Brook Parliament, 74. S. 92. Davies Proxies 4. Because the saving cannot save that which is not in esse. See Tenure (1) pl. 9.

(I) *What is a Manor. Or of what it must consist.*

* There must be two freeholders at least. Yelv. 190, 191. cites 32 H. 8. Comprise. Br. 31.

1. **THAT** which consists of copyholders only, and has no * freeholders, though it be known by the name of a manor, yet it is not in law a manor for want of freeholders. 6 Rep. 47. Mich. 4 Jac. C. B. in Sir Moyle Finch's Case.—Cites the Case of Vines v. Durham.—2 Roll. 45. 712.—Buls. 57.

2. Every manor must consist of demesne and services, and those are sufficient to support the being of a manor; for if the lord aliens his mansion-house which he had in possession, yet if the copyholds and services remain, it is still a good manor. Per Holt Ch. J. 5 Mod. 382. Mich. 9 W. 3. in Case of Winter v. Loveday.—Without the services it cannot be a manor. Arg. And. 105:

(K) *What passes by the Word Manor.*

* Co. Litt. S. 591. and see pag. 325. the notes there.

1. **BARON** seised of a manor in right of his wife aliened 4 acres for life, and after the baron granted the reversion to N. in fee, and the tenant attorned, and after the grantee purchased the intire manor, to whom the baron and feme levied a fine sur conuſance de droit come ceo &c. of the manor; and by the opinion of all the Court in Banco, the fine extends to the 4 acres which were severed, for they were parcel of the manor in reversion as to the feme, tho' they were severed in possession pro tempore; nevertheless, by Littleton, title * Attornments, fol. ultimo, it is not parcel of the manor. Br. Manor, pl. 3. cites 18 Aff. 3.

S. P. Br. Grants, pl. 60. cites 38 H. 6. 34. per Prisot.—If a feoffment in fee

2. If a man leases his manor for life, except the advowson, and after grants the manor cum pertin', the advowson does not pass; for it is not parcel of the manor at the time; so of an acre of land. Per Prisot. Br. Comprise &c. pl. 28. cites 38 H. 6. 37, 38.

is made of a manor, to which an advowson is appendant, and livery is made in the demesne, but no attornment, it was held, that the advowson shall pass, but none of the services. 3 Le. 193. Mich. 29 Eliz. B. R. Long's Case.—Sav. 103. Long. v. the Bishop of Gloucester and Hemmings. S. C.—If livery be not made, the advowson shall not pass, tho' the word (grant) be in the deed; for then the advowson shall be severed from the manor which was annexed to it. 2 Roll. R. 91. Trin. 17 Jac. B. R. Atwell v. Harris.

3. If a man has a moveable estate of inheritance in 13 acres
 parcel

parcel of a manor, they will pass by the name of the manor. Co. Litt. 48. b.

4. The lord *purchases in some tenancies of the manor*, and after sells the manor; the tenancies do not pass. Jenk. 232. pl. 4. cites D. 265.—Tenancies are no part of the manor. Arg. 2 Show. 440. cites 5 Rep. Mountjoy's Case.

5. Two *coparceners* of a manor, consisting of copyholds, freeholds, and demesnes, *make partition* of all except the copyhold and free services, after one of them having part of the demesnes severally by herself, as the other had the other part, and the demesnes remaining in coparcenary between them makes lease of her moiety of the said manor; whether the part allotted to her that made the lease passed by the name of the *moiety of the manor*, was not agreed by the Court, but by the better opinion of the Court, it seemed that the demesne was severed from the manor, and therefore passed not by that name. And. 221. Pasch. 28 Eliz. Thetford v. Thetford.

S. C. 1 Le. 204. Pasch. 31 Eliz. C. B.—* (Demesnes) is false printed there, and it should be the services of the freeholders and copyholders [226] remaining in coparcenary &c.

6. By *devise of a manor*, *rents and services will pass*. 2 Le. 43. Hill. 29 Eliz. C. B. Inchley v. Robinson.

7. By a *fine levied of a manor*, nothing but a manor in truth passes, and *not a manor in reputation*. Cro. E. 708. Mich. 41 & 42 Eliz. C. B. Mallet v. Mallet.

S. P. For they shall not be taken by intentment. But

it is otherwise *in a conveyance*; for there the intent of the parties will help it. Cro. E. 524. S. C.

8. The * word Manor *includes* all estates and degrees of estates of or in the manor, and by the grant of a manor the *reversion* will pass, even in the King's Case. 6 Rep. 56. Trin. 4 Jac. Ld. Chandos's Case.—D. 233.

* Comprehends the freeholds as well as the demesnes and ser-

vices. And a *survey* of a manor shall be as well of the freehold lands as of the demesnes. Arg. Ow. 74. 36 Eliz. in case of Higham v. Deff.—And there is no difference where the parcels are expressed, and where implied. Arg. Lat. 63.

If a man *leases 3 acres, parcel of his manor*, to J. S. *for life*, and *after grants the manor cum pertin'*, the *reversion shall pass*, for this is parcel in reversion. Per Prisot. Br. Comprite &c. pl. 28. cites 38 H. 6. 37, 38.—S. P. Br. Grants, pl. 60. cites 38 H. 6. 34. per Prisot.

9. *Reputation* is sufficient to pass a thing in conveyance by name of a manor, which in truth is not a manor. Yelv. 191. Mich. 8 Jac. B. R. cites 6 Rep. Sir Moyle Finch's Case.

But it should be really so, and not in reputation Yelv. 191.

only, to challenge and hold the privilege of a manor, as to hold a *Court Baron &c.* Mich. 8 Jac. B. R. The King v. Staverton.

(L) By what Words a Manor passes.

1. A Manor passes by the name of a *Knight's Fee*. Arg. Ow. 82. cites 7 E. 3.—Bulf. 54, Arg. cites 17 E. 3. 8.

2. If a *manor consists of fealty and rent*, and the lord *grants the rent*, by this the manor shall pass. Per Thorpe Ch. J. Br. Grants. pl. 76. cites 29 Aff. 20.

But contrary, if the manor be by homage, fealty, escuage and rent, and the rent only is granted; and if the lord grants his rent cum pertin. reserving to him

him

him a relief and escheat; quære if the manor shall pass; Brook says, it seems to him that it shall, if fealty and rent make the manor; contrary, where the manor consists in homage, fealty and rent; per Thorpe Ch. J. Br. Grants, pl. 76. cites 29 Aff. 20.

3. If a *feoffment* be made of *all his tenements in D.* and there is a *manor* which *extends into D. and S.* nothing shall pass which is in S. and so see there that it is *admitted, that a manor* may pass by the word *tenement*. Br. Grants, pl. 53. cites 9 E. 4. 6.

* Ibid. cites

4 E. 3. fo.

124. pl. 25.

4. A manor may pass by the name of 8l. land; or of a * *mes- suage*. Arg. 1 Buls. 54. cites 6 E. 3. 243. and 9 E. 3. — A. gives the *capital messuage and all other lands and tenements with the advowson appendant* to it lately belonging to the monastery of Milton. This comprehends the manor. For the general words of *all other lands and tenements* include all in general; for if I give all my lands and tenements belonging to such a monastery, my manor which belonged to it passes, tho' not given by name of a manor. Sav. 104. Trin. 30 Eliz. in Case of Long v. Bishop of Gloucester.

5. If a man has the manor of D. and he leases his manor of D. or *his manor called D.* or *his manor in D.* in every case the manor passes, per Manwood Ch. B. Mo. 235. says it was so resolved in anno 1 Eliz.

By this word (hereditament) the manor will pass; per Anderson.

6. The Queen seised of the manor of Gascoigne, and of the Grange, called Gascoigne Grange in D. did grant *all her lands, tenements, and hereditaments in D.* It was adjudged per tot. Cur. that the manor did not pass, and per Anderson Ch. J. it would be the same in the case of a common person. Godb. 136. Pasch. 28 Eliz. C. B. Giles v. Newton.

[227] (M) *What Things relating to a Manor pass by what Words.*

Arg. Golds. 105.

1. **M**EMBERS shall be taken for the towns and hamlets, where the manor has jurisdiction; per Dyer. Ow. 31. Pasch. 6 Eliz. Anon.

2. A. lets the *scite of his manor with all his lands* to the said manor *appurtenant*; hereby all the *demesne* lands do pass. But if it were *with all the lands appertaining to the said scite*, nothing passed but the manor-place; per Brown. Ow. 31. Mich. 7 Eliz. Anon.

See (F) pl. 3.

(N) *Manor suspended.*

1. **I**F a man has a seigniority in fee, and *lands descend on the part of the mother* to him, the seigniority is not extinguished, but suspended. For if the lord dies without issue, the seigniority shall go to the heir of the part of the father, and the tenancy to the heir of the part of the mother, and yet the father had as high estate in the tenancy as in the seigniority. Per 2 J. Godb. 4. pl. 5. Hill. 23 Eliz. C. B.

2. If

2. If lord and tenant are, and the lord releases all his right to the tenant and heirs of his body, by this the seigniorship is suspended during the tail; and so see that it is taken, that this is not any extinguishment, tho' the release be made to him who has fee simple in the land; the reason seems to be that the release goes by way of defeasance of estate of the seigniorship, which was in the lord at the time of the grant, and then this shall enure by way of grant. Br. Releases, pl. 86. cites 13 E. 3. and Fitzh. Voucher 120.

3. Contra where he, who releases, has nothing in him but a right at the time of the release made. Ibid.

4. The lord may release the services to the tenant, for life of the tenant, and after the death of the tenant the lord shall have the services again; for the ground in Littleton, that if a man releases for one hour to him who has the fee simple, it shall serve for ever, is, where the thing which the tenant had is released, and the tenant here had the land, but not the services, and therefore by such release the services are not extinct for ever. Br. Release, pl. 96. cites 13 E. 3. and Fitzh. Voucher 120.

Br. View,
pl. 96. cites
S. C.

(O) Services extinguished.

See Grant
(Y) pl. 3, 4.

1. IF three acres are held by suit of Court, and the lord purchases one acre of the three, or grants his seigniorship of one over, the suit is gone for ever. But if one escheat, or be alien'd in mortmain, for which the lord enters, the suit remains for the residue, per Periam J. Mo. 203. Pasch. 27 Eliz. C. B. in Knight's Case.

(P) Severance of Parcel. By what Act.

1. THREE coparceners of a manor; one levies a fine sur cognisance de droit come ceo &c. of more acres than the manor contains. This is a severance of a third part of those acres from the manor. b. D. 333. pl. 30. Pasch. 16 Eliz.

2. If a fine be levied of a manor, and conferee renders part to A. for life, and other part to B. for life, and the rent of the whole to C. till the entry of A. and B. it is one entire manor in the hands of the conferee. Arg. Godb. 129. Mich. 28 Eliz. C. B. in Case of Green v. Harris.

3. If I devise that my executors shall sell Black-acre parcel of my manor, and die; it remains parcel of the manor till sale made. So if the heir sells the manor, Black-acre shall pass; for it is but executory, and remains parcel till it be executed. Arg. Godb. 129. [228]

4. If A. recovers Black-acre parcel of a manor; before execution it is parcel of the manor, and shall pass by grant of the manor. Arg. Godb. 129.

(Q) Things

(Q) *Things severed. Where they shall be again Parcel.*

So if lease
for life be of
a manor ex-
cept one
acre; dur-

ing the lease the acre is not parcel of the manor; but otherwise in the case of a * lease for years, 11 Rep. 47. b. in Lisford's Case.—cites 38 H. 6. 38. b. Pl. C. 103. in Fulmerston's Case.—
* Arg. Cro. E. 522.—See (Q. 2) pl. 2.

1. IF one makes a gift in tail, or lease for life, of parcel of the manor; during those estates the land is no parcel of the manor, Pl. C. 422. b. Trin. 14 Eliz. Bracebridge v. Cook.

2. A man seised of a manor in *jure uxoris*, leased part of it without the wife for years, the reversion is not parcel of the manor; but otherwise if the lease had been made by the husband and wife; per Manwood J. Le. 265. 20 Eliz. C. B. in Bracebridge's Case.

3. If 10 acres of the demesnes of a manor are leased for 20 years, and after a lease is made of the manor for 40 years, there the reversion of the 10 acres shall pass presently, and yet it is not properly parcel of the manor during the first term. And it seems, the franktenement and the fee of the 10 acres remain parcel of the manor, but yet it is not in all degrees parcel. Sav. 113, 114. Pasch. 28 Eliz. in Case of Thetford v. Thetford.

But if an
acre, or a
house had
been * ex-
cepted, and
A. had af-
terwards

4. Sale of a manor to A. and his heirs, except the trees, and afterwards the feoffee purchases the trees, they are again made parcel of the inheritance, tho' they were absolutely divided for a time. 11 Rep. 50. Mich. 12 Jac. in Lyford's Case.—cites 4 Rep. 63. Harlackenden's Case.

purchased the acre or the house, none of them should be parcel of it again. And so a difference between *partes integrales similes & dissimiles*, and between *partes dissimiles solo annexas seu adherentes*, and *domus & partes dissimiles excrecentes*, as arbor. 11 Rep. 50. Lisford's Case.—cites 9 E. 3. 2. a. b.—1 Roll. R. 101.—Cro. E. 522. in Case of Ive v. Samma.

D. 326. b.
2 Roll. 170.
—But while
the soil is
under water
the jurif-

diction belongs to the admiral. 5 Rep. 107. ut ante.

5. The soil upon which the sea flows and reflows, viz. between high-water mark and low-water mark may be parcel of the manor of a subject. 5 Rep. 107. Pasch. 43 Eliz. Sir Henry Constable's Case.

6. If one grant away any part of the demesnes in fee, they are severed from the manor, and can never be part of it again, tho' it be but for an instant. Skin. 192. Trin. 36 Car. 2. C. B. in Case of Lemon v. Blackwell.—cites 6 Rep. 65.

7. Lands severed from the manor can never after become parcel of it in reality, but it may in reputation; as if lands part of a manor be aliened away and repurchased, and an unity of possession for a considerable time after. 6 Mod. 151. Pasch. 3 Annæ. B. R. The Queen v. Duchess of Buccugh.

(Q. 2) Re-

(Q. 2) Reversion. What passes by a Grant as Parcel of the Reversion. Things severed.

1. A. Seised of a manor in fee made a lease for years of the scite and * demesnes of the manor to J. S. and after the lessor granted the reversion of the same manor in fee, and the lessee attorned. The justices held that the grantee took nothing by this grant; that the grantor had not any reversion in the manor, and that the scite and the demesnes are not the manor. Bendl. 24. pl. 39. Pasch. 29 H. 8.

The prior of B. leased the scite and all the demesnes of the manor of W. to A. for life rendering rent, and after

the reversion of the scite and demesnes and the residue of the manor came to the King by the dissolution of the priory, and after the King granted the manor with the appurtenances to C. for 21 years by the words, *all rents, services, profits, and hereditaments of the said manor; but no express mention of any reversion was made, nor any recital of the lease of the scite and demesnes aforesaid; but a rent of 74 l. was reserved to the King upon the lease of the manor.* By the better opinion the reversion passed by the name of the manor. D. 233. pl. 10. Mich. 6 & 7 Eliz. Aprice v. Rogers. [229]

2. If A. lets an acre parcel of a manor for years, the reversion there is parcel of the manor, and shall pass by the grant of the manor; but a lease of a manor excepting an acre, the acre excepted is not any part of the manor to any purpose, and shall not pass by a grant of the manor. Cro. E. 522. Trin. 38 Eliz. Arg. in Case of Ive v. Sams.—cites Pl. Com. 104. per Bromley and 38 H. 8.

Pl. C. 423. Bracebridge v. Cook.—11 Rep. 47. b. in Liford's Case.—So lease of a manor except one acre with

the advowson the acre with the advowson, will not pass by grant of the reversion but are severed and disunited from the manor for ever as a branch or other member divided from the body. 11 Rep. 50 Mich. 12 Jac. in Liford's Case.—2 Le. 221. Bawel v. Lucas. if the lease be for years or for life.—A lease for life is made of a manor, excepting an acre; by grant of reversion of the manor this acre does not pass; otherwise if lease for years is made with such exception. A thing in possession cannot pass as parcel of a thing in reversion, where lease is made for life with such exception; otherwise, if part of the manor is leased for life with such exception, and after a grant in fee of the manor is made to another, the reversion of the parcel in lease shall pass with the manor; for the fee of it was not severed from the manor, and a thing in reversion may pass as parcel of a thing in possession, as in this case of a manor the exception for life was express separation pro tempore; where advowson appendant is granted for life, a grant of the manor after to another passes the reversion of the said advowson.—Jenk. 510. pl. 91.—Pl. C. 103. b. Arg. in Case of Fulmerston v. Steward.

3. Tenant in tail of a manor leases parcel for years; and afterwards makes a feoffment of the whole manor and makes livery in the demesnes not leased; the reversion in the lands leased do not pass; but contrary in case of a tenant in fee of a manor; and that without deed with attornment; per Dyer Ch. J. Le. 265. 20 Eliz. C. B. in Bracebridge's Case.

4. If A. be disseised of one acre parcel of his manor, tho' the acre in right is parcel of the manor, yet if A. enfeoffs another of his manor the right of this acre shall not pass but is severed from the manor for ever. 11 Rep. 47. Mich. 12 Jac. in Liford's Case.—cites 38 H. 6. 38. a.

5. If I have a manor in which is a park and fish ponds, and I

demise the manor, *except the game of deer and fish* and after I grant over the reversion, the grantee shall have the deer and the fish as a thing *attendant on the inheritance*. 11 Rep. 50. b. in Liford's Case.

6. The *freehold of parcel* of a manor in possession *being excepted*, where a manor is *leased for life*, does not pass with the reversion of the manor; but where *part of the manor* is granted for life, there upon grant of the manor, the possession and reversion of the said parcel passes with the said manor, for this parcel was parcel of the manor and not excepted. Jenk. 311. pl. 91.

See (C)—
Appendant
(B)—Grant
(Y) pl. 3
& 4.

(R) By what Act or Grant (as Lease &c.) that which was Parcel shall be so severed as that by Grant of the Manor the Reversion shall not pass:

But if they are jointly seised, or in right of the wife, and they join in a lease for life of parcel [230] and after they levy a fine of the manor, the reversion will pass by the fine; per Cur. And so see that it remains parcel of the manor in reversion. Br. Grants, pl. 126. cites 18 Aff. 2.

1. IF the King leases parcel of a manor for life, the reversion of this parcel passes to the King; for the reversion had always continuance in the same capacity, and no alteration is made thereof by force of the lease. But where the lease for life is a discontinuance, there he gains a new reversion and this shall not be parcel of the manor. And therefore if a man is seised of a manor in right of his wife, and he leases parcel for life, this is a discontinuance and he has gained the reversion in his own right, so that the reversion cannot be parcel of the manor. Arg. Winch. 46. and agreed by the counsel on the other side. Ibid. 47. Mich. 20 Jac. C. B. Bishop of Gloucester v. Wood.

But where the granting a lease for life works no discontinuance, the

2. So if tenant in tail lets parcel of a manor for life, the reversion of this parcel is not parcel of the manor for the reason aforesaid; arg. and agreed by the other side; for in these cases the lessor gains a new fee simple. Winch. 46, 47.

reversion continues parcel of the manor; as in the case of a lease for life by a bishop; this is not any wrong; for the successor may enter. See Winch. 47. Bishop of Gloucester v. Wood.

(R. 2) Seigniorie extinguished as to Parcel, or all.

1. IF the lord disseises his tenant and makes feoffment in fee, and the tenant re-enters, the lord shall not have the seigniorie, nor shall the feoffee have it; quod fuit concessum per totam Curiam 9 H. 7. 25. a.

2. If lord, mesne and tenant are, and the mesnalty escheats to the lord upon the death of the tenant without heir, the tenant shall hold of the lord by the same services as he held before. See Tenure (A. a) pl. 6. cites 7 E. 4. 12. by Needham, Davies County Palatine 67. Co. Litt. 99. b. D. 30 H. 8. 44. 30. and the

the feignory is extinct. 10 Aff. 29. adjudged 2 E. 4. 6. by Danby, 1 E. 3. 6. Brook Tenures 91. Fitz. Avowry 258.

3. If disseisor of a manor severs the demesnes from the services, and afterwards the disseisee demands the manor, it is well; because as to him it is a manor still. Arg. Lat. 63. cites 9 E. 4.

4. If tenant makes feoffment of his tenancy; and the lord at attorney makes livery; this does not extinguish his feignory; because what he does is only by an authority. Mo. 11. pl. 41. Hill. 4 E. 6.

5. If tenant enfeoffs the lord and a stranger to the use of another and his heirs, and makes livery to the stranger, this is no extinguishment of the feignory; but if the livery was made to the lord it is otherwise; and yet is the possession instantly carry'd away to the stranger, by the statute 2 H. 7. 13. per Dyer. Owen 31. Pasch. 6 Eliz. in Case of Sutton v. Robinson.

S. P. So that the wife of the lord shall not have dower; nor had he himself such possession, where.

if he might be vouch'd. Mo. 56. per Dyer Ch. J. Pasch. 6 Eliz. in S. C.—Dal. 60. pl. 11. S. C.—D. 140. pl. 41. in Marg.

6. If tenant enfeoffs his lord and a stranger, and they re-enfeoff the tenant and his wife, the feignory is all extinct; for the land in their hand was discharg'd of the feignory, and by their feoffment all passes from each of them, they being jointenants. Mo. 56. Pasch. 6 Eliz. Sutton v. Robinson.—Ow. 31. S. C.

D. 140. b. Marg. pl. 41.—Dal. 60. pl. 11. S. C.—So where tenant enfeoffs

the lord of a moiety of a tenancy, and the lord aliens this over to another, the feignory is extinct pro particula.—Mo. 56, Pasch. 6 Eliz.—Sutton v. Robinson.—Ow. 31. S. C.—And if the lord release all his right in one acre of the lands held, it is extinguishment of all the feignory. Mo. 56. Sutton v. Robinson.—Dal. 60. pl. 11. S. C.—Ow. 31. S. C.

7. If tenant does offence, by which his land comes to the King by royal escheat, it seems that the feignory is clearly extinct; but he doubts of the purchase of the King; per Shuttleworth. Mo. 237. Pasch. 29 Eliz. Broke v. Smith.

(S) Pleadings.

[231]

1. *A S S I S E* of a rent-charge out of the manor of D. in D. the defendant said, that the manor extended into D. and C. this is a good plea to the writ prima facie; the plaintiff said, that this parcel which is in C. is the services of the manor, and all the demesnes in D. and a good replication; for nothing can be charged but the demesnes, and not the services. Br. Replication. pl. 28. cites 12 Aff. 40.

2. If a *præcipe* be brought of a manor and 40 acres, tenant vouches, and vouches enters and vouches himself for the manor and 40 acres also as parcel of the manor; ['tis good] for tho' it was not parcel, yet if he was enfeoffed as parcel, he ought to vouch accordingly. See Voucher (N. a) pl. 5. cites 41 E. 3. 23. b.

3. In *avowry* seisin of the services was alledged in J. N. who granted the manor by fine to the avowant, and the tenant attorn'd.

and for so much arrear the lord avowed; *the plaintiff said, that those services were not parcel of the manor at the time of the fine levied, and upon argument the issue was accepted, and yet it may be, that it was not parcel at the time &c. and yet it is parcel now as by mesnalty, escheat, or forejudger, or by gift in tail of these services, and the tail was extinct afterwards; but this ought to be shewed by replication, as it seems.* Br. Avowry, pl. 32. cites 48 E. 3. 26.

4. Formedon; and demanded *the third part of the manor of D.* The tenant said, *that at the day of the writ purchased S. P. was seized of 30 acres of land in D. parcel of the same manor, and therefore he ought to have demanded the third part of the manor except and foreprise the 30 acres aforesaid, judgment of the writ, and was compelled by the Court, to say absque hoc, that he himself had any thing in the 30 acres the day of the writ purchased or ever after.* Br. Brief, pl. 176. cites 19 H. 6. 12, 13.

Br. Estop-
ple pl. 90
cites S. C.

5. If A. has a manor in the county of W. and B. holds land of the same manor in the county of D. by rent and services, this rent and services are parcel of the manor; and in demanding the manor he shall demand it in the counties of D. and W. where he shall make surmise; and so see that the land held is not parcel of the manor, but the rent and services issuing out of it are parcel of the manor. Br. Manor, pl. 2. cites 22 H. 6. 53.

So in avow-
ry of distress,
taken in 3
acres, be-
cause it is
held of his
manor, and
did not shew

6. In forcible entry, where the defendant said, *that the house and land &c. was parcel of the manor of B. and intitled himself to the manor by escheat, and did not shew in what county the manor was, and yet good; for it shall be intended in the county where the land is.* Br. Pleadings, pl. 53. cites 36 H. 6. 17.

where the manor is, and well; for it shall be intended where the land is. Br. Ibid.

But if he
will sever it
and recover
but a parcel,
then he may
demand the
manor of C. in T. or so many houses or acres in T. and then he shall recover only that which is in T. Ibid.

7. If the manor of C. extends into T. and W. and præcipe quod reddat is brought of the manor of C. and does not say in T. and W. yet it is well; for the manor is entire, and by this he shall recover the whole manor. Br. Præcipe, pl. 14. cites 4 E. 4. 15.

8. If disseisor of a manor severs the demesnes from the services, the disseisee must make his demand according to his right; and as to him, it is a manor still. Arg. Lat. 63. cites 9 E. 4.

9. It is said, that where a recovery is pleaded of a manor, of which the land is parcel, if the other would contradict it, he shall say that *not parcel of the manor, and so not comprised.* Br. Comprise &c. pl. 19. cites 7 H. 7. 8.

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10. In formedon brought of lands in A. B. and C. tenant pleads a fine of all by name of the manor and tenements in A. and B. and said nothing of the land in C. The Court held, that by the name of the manor, the lands in all the villages would pass, and the defendant may, if he will, plead as to the land in C. *niient comprise* in the fine. Brownl. 155. Anon.

11. A manor cannot be claimed unless by its name of incorporation, as Anderson term'd it. Ow. 4. Bragg v. Brook.——

Declaration

Declaration was *de manerio in D.* instead of *de D.* and held ill. 2 Lev. 178. Mich. 28 Car. 2. B. R. Underwood v. Sanders.

12. A manor *in reputation* cannot be demanded by name of a manor. Lat. 63. in Case of Hems v. Stroud. See Lev. 28.
Thinne v.
Thinne.

13. If a man brings a *præcipe* of a manor, and in it *demand*s any lands *part of the manor*, he must either *abridge his plaint*, or if the tenant pleads this matter in abatement, the writ shall abate *quia bis petitum*; it being superfluous to demand the same thing twice; and if lands are mentioned with the manor, they *shall be intended to be no part of the manor*; because all that is part of the manor is comprehended in a *præcipe* of the manor; as 36 H. 6. 17. Sci. Fa. to have execution of the manor of Dale, and 6 acres of land, it is no plea to say the six acres are parcel of the manor, because the contrary shall be intended. Pig. of Recov. 42, 43.

(T) Customary Manor, its Power.

1. **L**ORD of such customary manor may *grant copies*, and *hold Courts*; and such manor may *pass by surrender and admittance*; and *finer*s shall be paid upon admittances, whether upon alienation or descent, Per Fleming Ch. J. Bulf. 57. Mich. 8 Jac. in Case of the King v. Stafferton. Cites 11 Rep. 17, 18. Sir H. Nevil's Case.

(U) Customary Manor forfeited.

1. **I**F such customary manor be *forfeited*, the lord shall have the customs and services belonging to it. 11 Rep. 18. S. C. cite 1
Bulf. 57. Mich. 10 Jac. in Sir Henry Nevile's Case.

(W) Tried. How.

1. **W**HETHER certain lands are parcel of a manor in ancient demesne or not shall be tried *by the country*; for it cannot be tried by doomsday-book, tho' whether the manor be ancient demesne may. 9 Rep. 31. a. in the Abbot of Strata Marcella's Case,—cites 22 Aff. 45.

(X) Lord of a Manor. Who. And his Power.

1. **B**Y this word *lord* shall be intended *the person of whom the vill is held*, and not *he who is seised of the vill*; for if there be 20 *mesnes*, every one of them is lord of the vill, and yet none shall have common but he who is seised in possession of the vill. Br. Prescription, pl. 27. cites 22 H. 6. 55.

2. A lord of a manor cannot *justify* under a royalty to fish, hunt, and fowl in another man's soil. Arg. 11 Mod. 74. cites Jo. 440. Vent, 122.—Per Holt Ch. J. a man may have free warren in another's soil *ratione privilegii*, but *not soli*, Ibid. 75,

[For more of Manors in general See tit, Copyhold &c.]

(A) Marches of Wales.

1. **E**RROR was brought in B. R. upon a judgment in ejectment in Wales before the justices there, and upon considering the statute of * 28 H. 8. which wills, that error upon a real action shall be reversed in B. R. and upon personal by bill before the president and council of the marches, it was doubted, whether ejectment, being a *mixt action*, was within this statute; but at last it was adjudged that error lay in this Court, Mo. 248. pl. 391. Mich. 29 Eliz. Griffith's Case.

* 34 & 35
H. 6. cap.
26. s. 113.

Palm. 364.
Brig's Case.
* Orig. is
(ne re-
straine) but
it seems it
should be
(neft re-
straine).

2. In the Court of the Marches of Wales &c. a man *promised to make a lease of certain land before Michaelmas* (in consideration of 80*l.* then presently paid). *Before Michaelmas the land is evicted*, and the *lessee sued to be relieved by the equity of the said Court*, and a prohibition was moved for, because it was above 50*l.* Per Ley Ch. J. Here he cannot have debt or account, but *case he may*, and sue to be relieved in equity and be relieved according to his case, tho' action of debt above 50*l.* value cannot be brought in the Court of Marches &c. Yet the case of the equity * is not restrain'd; to which Doderidge and Haughton J. agreed, 2 Roll. R. 308. Pasch. 21 Jac. B. R. Arnias v. Briggess.

3. Marches of Wales have *three powers*, 1. For actions at common law, as *debt* and *trespass sur case*, and in them they ought not to hold plea above 50*l.* 2d. Of cases of equity, and of them no certainty is put. 3d. Of criminal cases. 2 Roll. R. 308, per Chamberlaine J. in Case of Arnias v. Briggess.

4. They have nothing to do with the *possessions of men*, unless in respect of force plena curia. 2 Roll. R. 309.

5. A prohibition was granted to the Court of the Marches of Wales, because lands being descended to an infant subject to a trust, they had not only enjoined the possession of those lands, but of other lands also descended to him. And the Court said, that they cannot *sequester lands* at all for the performance of a decree of their Court to pay money; for they can only agere in

personam

personam & non in rem. Vent. 11. Hill. 20 & 21 Car, 2. B. R. Anon.

6. 1 W. & M. Sess. 1. cap. 27. dissolv'd and took away this Court, but confirmed judgments and decrees passed there before the first of June 1689.

(A) Margin.

1. **W**HERE a county is in the margin of a declaration, and the trespass or thing is alledg'd to be done apud D. and does not shew in what county D. is, yet it is well enough; because it shall be intended to be in the same county which is in the margin; for a general intendment shall there serve, as 34 H. 6. Cro. J. 96. Mich. 3 Jac. B. R. per Popham, Yelverton and Fenner. Quarles v. Searle.

But intendment shall [234] not be, where a particular vill is in the margin, to give jurisdic-

iction to an inferiour court to take away the jurisdiction of superiour courts without shewing it, Ibid. per eisdem. — It is sufficient to put the county in the margin of the declaration in an action, but not so in an indictment. Arg. Vent. 119. cites 1 Cro.

2. On a motion to quash an order made by two justices the exception was, that it does not appear that they were justices for that county; for it is set forth to be made by A. and B. two justices com'. prædict. and there is no county in the body of the order for the prædict. to refer to, and it shall not refer to the county in the margin; whereupon it was quash'd, per Cur. 11 Mod. 266. pl. 6. Hill, 8 Ann. B. R. Anon,

Mariners.

(A) Mariners Wages. Considered how.

1. **S**eamen's wages is a chose en action, tho' the service is not then done, 2 Vern. 595. Mich. 1707. Crouch v. Martin and Harris,

2 Vern.
391. Mich.
1700. con-
tra. Mitchell
v. Edes.—
Ch. Prec.
125. S. C.

2. Seamen's wages are *assignable*, and the assignment specifi-
cally binds the wages, and such assignment shall be paid off
before a bond debt; per Cowper C. 2 Vern. R. 595. Mich.
1707. Crouch v. Martin and Harris.

See (C)—
(F) pl. 5.

(A. 2) Mariners Wages. Payable or lost. In what
Cases, and how much.

§. P. 2 Mol-
loy, cap. 3.
f. 12.

1. **W**HEN a vessel hath *unloaded*, and the mariners demand
their wages (whereof some have neither bed, chest, nor
cabbin aboard) the master may lawfully keep back part of their
wages till they have brought back the ship to the port from
whence she came, unless they give good security to serve out
the whole voyage. Mieke's Laws of Oleron 8. f. 18.

2. When the master of a ship *hires the mariners in the very
town to which the vessel belongs*, whereof some at their own finding,
others of them at his own costs and provision; and it happens,
that the ship cannot procure freight in those parts where she is
arrived, but must sail further to get it; then the mariners that
are at their own finding ought to follow the master, and such
as are at the master's own costs ought to have their wages in-
creased, kenning by kenning and course by course, because he
hired them to one certain place. And if they go not so far as to
that place which was agreed upon, yet they ought to have their
full hire, as if they had gone thither; but they must bring back
(with God's help) the vessel to the place from whence they took
her. Mieke's Laws of Oleron 8. f. 19.

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3. When a ship is arrived at her port of discharge, and gets there
into dry ground, so that the mariners think her *safe every way*,
then the master ought to increase wages, kenning by kenning,
Mieke's Laws of Oleron. 9. f. 26.

Mal. Col-
lection of all
sea laws 57.
S. P.

4. If a *rebellious mariner* repent in time, and offer amends for
a simple rebellion, and the master notwithstanding refuse, he
may follow the ship and obtain his hire. Mal. Lex. Merc. 104.
cap. 23.

* S. P. and
so they must
in port. Mol-
loy 242.

5. Mariners ought each one to *help and assist others* * on the
seas, or else he that refuseth loseth his hire, and the *oath of his
fellows shall be a proof* against him. Mal. Lex. Merc. 104.
cap. 23.

6. If a ship pass further than the mariner was hired, his hire
should be accordingly augmented, except he be hired a *mareages*,
mais non a deniers, as the Frenchman speaks, or by the month for
all the year. Mal. Lex. Merc. 105. cap. 23.

But if he be
set out from
the harbour,
and have be-

7. A master may put away a common seaman without any
lawful cause before his departure, paying the said seaman the moiety
of what has been agreed upon. Mieke's Laws of Wisby 15. f. 3.

gun the voyage, the master that puts him away without a cause is bound to pay him his full wages.
Mieke's Laws of Wisby. 15. f. 3.

8. If a mariner be found to be *infected with any contagious disease*, the master is free to leave him in the first place he shall arrive at, and shall not be bound to pay him any wages; provided the sickness be clearly proved by the deposition of 2 or 3 mariners. Miede's Laws of Wisby 21. f. 62.

9. By the law marine, if the master orders his *boat* to be manned out, and the same is *unfit for sea*, the tews or other accoutrements being impotent, and any *mariners happen to be drowned*, he is to pay *one years wages to the heirs* of the drowned, 2 Molloy. cap. 3. f. 2.

10. If the *ship breaks ground*, and is set sail, if after she arrives at her desired port, their full pay continues till she returns. 2 Molloy. cap. 4. f. 2.

11. If a *ship* happens to be *seised on for a debt*, or otherwise to become forfeited, the *mariners must receive their wages*, unless in some cases where their wages are forfeited as well as the ship; as if they have letters of mart, and instead of that *they committed piracy*, by reason of which there becomes a forfeiture of all; but *lading prohibited goods* aboard a ship, as wool &c. tho' it subjects the vessel to a forfeiture, yet it *disables not the mariner of his wages*; for they having honestly performed their parts, the ship is tacitly obliged for their wages. But if the *ship perishes at sea*, they lose their wages, and the owners their freight; and this being the marine custom is allowed by the common law as well as the civil law. 2 Molloy. cap. 3. f. 7.

12. If the goods are *so imbezled or damnified*, that the ship's crew must answer, the owners and master must deduct the same out of their freight to the merchants, and the master out of the mariners wages; for *before they can claim their wages out of what the ship hath earned*, she must be acquitted from the damage the merchant hath sustain'd by the negligence or fault of the mariners. 2 Molloy. cap. 3. f. 9.

And the reason is, for that, as the goods are obliged to answer the freight, so the freight and ship is tacitly ob-

liged to clear the damage; which being done, the mariners are then let in to their wages. Ibid.

13. If a mariner *deserts his service before the voyage ended*, by the law marine he loses his wages; and so it hath been conceived the same custom will bar him at common law. 2 Molloy. cap. 3. f. 10.

14. *Money or cloaths taken up* by the mariners and entered in the purser's book is by the custom marine a discount or receipt of so much of their wages as the same amounts to, and in action brought by them for their wages the same shall be allowed. 2 Molloy. cap. 3. f. 11.

15. Upon a motion for a prohibition it was agreed, that if the *ship* do not return, but is *lost* by tempest, enemies, fire, &c. the mariners shall lose their wages; for otherwise they will not use their best endeavours, nor hazard their lives to save the ship. 1 Sid. 179. pl. 14. Hill. 15 & 16 Car. 2. B. R. Anon.

If a ship is lost before

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she arrive at any port of delivery,

the seamen lose all their wages, but if she is lost after she comes to a port of delivery, then they only lose their wages from the last port of delivery; but if they run away, tho' after they come to a port

a port of delivery, they lose all their wages, and wheresoever *freight* is due, wages are due. 2 Show. 283. Hill. 34 & 35 Car. 2. B. R. Anon.—12 Mod. 442. S. P.—If a ship goes *freight of an outward voyage*, the seamen shall have their whole wages out; but if at their return the ship be taken or other mischief happen, whereby the *voyage homeward is lost*, they shall have but *half wages* for the time they were in *harbour abroad*; per Holt Ch. J. 12 Mod. 408. Trin. 12 W. 3. Anon.—East India Company takes *bond from the mariners and officers not to demand their wages unless they return to the port of London*; the ship arrives at a delivering port and afterwards is taken by the French; yet they shall have their wages to the time the ship arrived at the delivering port; per Gowper C. 2 Vern. 727. Mich. 1716. Edwards v. Child & al.

(B) Wages. *Suable for. In what Court, and when.*

A. moved for a prohibition to the Admiralty for libelling against the body of a

1. THE Court will be well informed that the libel is for mariners wages; for otherwise, (as if *carpenters* libel for their *work aboard a ship in a haven*, being *infra corpus com.*) the Court will grant a prohibition. 2 Molloy. cap. 3. f. 8. cites the Case of Sitwell & al. v. Love & al. 27 Car. B. R. *Ship in the river Thames* for mariners wages, and that *had never been extra corpus comitatus*; the suggestion was, that a shipwright was in treaty with the captain for the sale of the ship; and as a *trial of a ship* it is usual for the captain to go on board, and to bring mariners with him, and to employ them about the ship, and then to launch her, &c. afterwards they disagreed before the property was altered, and the workmanship was removed from the ship, and the hull returned to the shipwright. Now the question in this case was, if it was within the reason and rule of mariners wages, the ship not being benefited by the men's work; and the Court at first thought it somewhat difficult. Now, tho' in this case there was *no work done at sea*, yet inasmuch as upon the face of the libel it appeared the suit was for seamen's wages, and for the indulgence due to mariners, all the Court were of opinion, the Admiralty had a jurisdiction, and so denied a prohibition. 11 Mod. 31, 32. Mich. 3 Annæ. B. R. Osman v. Wells & al.

Molloy. 245. S. P. that he may sue in the Admiralty.

2. *Mate of a ship* libelled in the Admiralty Court for his wages, and upon prohibition moved for it was agreed per Cur. that it ought to go in case of a *master*; *secus* in case of mariners; and the mate being a mean between both, it was doubted; but the Court inclined to consider him as a mariner, because he is hired by the master as other mariners; but the master is put in by the owners. And after, (upon conference with the Common Pleas, where a like case was under consideration) it was ruled that no prohibition should go. 12 Mod. 440. Hill. 12 W. 3. Grant v. Baily.

In this case the owner was beyond sea, so that it was insisted, that no prohibition

3. It is mere ** indulgence* to mariners to *sue* for wages in the Admiralty; but if the master sues for wages there, a prohibition shall go; for he contracts on the credit of the owners, but the mariners on the credit of the ship. 1 Salk. 33. Trin. 12 W. 3. B. R. Clay v. Surgrave. should go unless some sufficient person would put in bail to an action &c, which the Court thought reasonable, otherwise the debt might be lost; yet a prohibition was granted absolutely. Carth. 518. S. C.—12 Mod. 405. S. C.—* 2 Molloy cap. 3. f. 8. S. P.—And this indulgence was, because the *remedy* in the Admiralty was the *easier and better*; easier, because they must sever here, whereas *they may join there*; and better, because the ship it self is answerable; but it is expressly against the statute, tho' now communis error facit jus. 1 Salk. 33. Clay v. Surgrave.

4. *Prohibition* was moved for to stay a suit in the Admiralty by a *surgeon of the ship* for his wages, and the suggestion was, that all was paid to the master; per Cur. payment to the master

is not payment to the seamen, but the ship itself is liable for their wages, and they would hear counsel. 12 Mod. 526. Trin. 13 W. 3. Maddox v.

5. 4 & 5 Anne cap. 16. S. 17. Enacts that all suits in the Admiralty for seamen's wages shall be commenced within six years after the cause of action accrued. [237]

S. 18. If any person intitled to such suit for seamen's wages be within the age of 21 years, feme covert, non compos mentis, imprisoned, or beyond the seas, such persons shall be at liberty to bring the same actions, so as they take the same within six years after their being of full age, discoverd, of sane memory, at large, and returned from beyond the seas.

S. 19. If any person, against whom there shall be any such cause of action for seamen's wages, be at the time of such cause of action accrued, beyond the seas, such person, who is intitled to such action, shall be at liberty to bring the said action against such persons after their return from beyond the seas, so as they take the same after their return from beyond the seas within such time as is limited for the bringing of the said action by this act.

6. Mariners libelled for their wages in the Admiralty, and a special contract reduced into writing was suggested in order to have a prohibition, but it was denied. 8 Mod. 379. Trin. 11 Geo. The Mariners Case.

Vent. 146.
Anon.—
The charter and contract made on land is

only to ascertain them. 3 Lev. 69. Coke v. Crechett.—S. C. cited 11 Mod. 32.—Prohibition shall not go to stay a suit in the Admiralty for mariners wages, tho' the contract be upon land; for it is more convenient for them to sue there, because they may all join. 1 Vent. 146. Trin. 23 Car. 2. B. R. Anon.—1 Vent. 343. S. P.—2 Vent. 181. S. P. Allison v. Marsh.—2 Keble, 779. the King v. Pike. S. P.—Winch. 8.—But if there be a special agreement that mariners shall receive their wages in any other manner than usual, or if the agreement be under seal, in both these cases prohibition shall go; but where it is in writing only, it is but a parol agreement; and in such case the Admiralty has jurisdiction. Per Cur, 12 Mod. 38. Pasch. 5 W. & M. Dpy v. Addison.

(C) How they ought to behave on particular Occasions.

1. THE mariners are bound to save and preserve the merchandise to the best of their power: and whilst they do so, they ought to have their wages paid them; otherwise not; neither is it lawful for a master to sell the cordage, without the merchants leave; but he is bound at his peril to preserve the whole so far as in him lies. Mieke's Laws of Wisby 16. l. 15.

2. The mariners are bound to preserve and take care of the goods at the request of the merchants, master, and pilot. Mieke's Laws of Wisby 19, l. 47.

3. For the taking care of the goods, the mariners shall be paid, every time they shall stir the corn, a denier for every last; and if they refuse to do it, so that the corn comes to be indamaged, they are bound to make up the damage according to the judgment of the master and pilot. * As for the unlading they shall have

* Ibid. 15, l. 5. is that they shall have 4 deniers a last for lading,

and three deniers a last for unloading, and that shall be their salary for hoisting of goods. have a denier for every last, and the like shall be allowed them for all other commodities whatever. Miege's Laws of Wisby 19. f. 48.

4. The mariners ought to shew the master the *cordage used for hoisting up of goods*; and to acquaint them with any thing that is wanting therein to the best of their knowledge; and if the master neglects it, the damage ensuing thereby shall be upon his account; but if the mariners fail in their duty herein, they shall be answerable for the mischances that shall happen thereby. Miege's Laws of Wisby 19. f. 49.

[238] 5. If it chance otherwise than well with the master, the mariners are then holden to bring back the ship to the port from whence she was freighted without delay, except it be otherwise provided. Mal. Lex. Merc. 104. cap. 23.

(D) Under what Regulations a Mariner must be.

1. IF any vessel happen through misfortune to be cast away, in what place soever it be, the mariners are bound to save as much of the lading as they can; and if they save part thereof, the master shall allow them a competency to get home to their own country. And in case they save so much as may enable the master to do this, then he may lawfully pledge to some honest person such part thereof as may serve for that purpose; but if they have not endeavoured to save the things aforesaid, then the master is not bound to provide for them; but he ought to keep them in safe custody, until he knows the pleasure of the owners. And this he ought to do like a faithful master; otherwise he shall be bound to give satisfaction. Miege's Laws of Oleron. 4. f. 3.

Miege's Laws of Wisby 16. f. 17. S. P. —S. P. and that half ought to be left on ship-board. Molloy 242.—Ibid. 243. All mariners are prohibited to go out of the ship, and to leave her after the voyage, and

2. When a vessel departs from any country, laden or empty, and arrives at any port or harbour, none of the mariners ought to go out of the ship without the master's leave. For in such a case, if the vessel should happen to be lost, or by any misfortune be damnified, they must make satisfaction for the same; but if the vessel be moored with two or three anchors, they may then lawfully go out of her without the said master's leave, provided they leave behind them on ship-board such a number of the ships company, their fellow mariners, as is sufficient to look to the vessel and her lading; provided also, that they return again in due time to their said vessel; for if they stay longer than is meet, and any mischance happens to the ship, they ought to make satisfaction if they have wherewithal. Miege's Laws of Oleron 5. f. 5.

the unloading of the ship, till the same be unrigged and sufficiently ballasted. Miege's Laws of Wisby 20. f. 54.—They ought not to depart from on ship-board when once admitted, (which is always when they break ground) without licence of the master; and before they may so do, they are to leave a sufficient number to guard the ship and decks. Molloy. 243.

3. When

3. When a difference happens between the master of a ship and any one of his mariners, the master shall deprive him of three meals before he turns him out of the ship; but if the said mariner do offer in the presence of the rest of the mariners to make the master satisfaction, and the master refuses the same, and resolves (notwithstanding such offer) to put him out of the ship; in such case the said mariner may follow the said ship to her port of discharge, and ought to have his * wages paid him as if he had come in the ship, or as if he had made satisfaction for his misdemeanor before the ship's company. And if the master take not another mariner into the ship in his stead, as able as the other, and the ship or lading happen to be, thro' any misfortune, damaged, the master shall make good the same, if he have wherewithal. Mieke's Laws of Oleron. 6, 7. f. 13.

S. P. Mieke's
Laws of
Wisby. 17.
f. 25.—
* S. P. that
he shall have
his whole
wages. Mola-
loy. 242.

4. A master, that has hired seamen for a voyage, shall keep the peace betwixt them, and do the part of a judge at sea; and if there be any of them that gives another the lie; before they have bread and wine on the table, he that has given the lie shall pay 4 deniers; but if the master himself gives any other the lie, he shall pay 8 deniers; and if any of the mariners gives the master the lie, he shall also pay 8 deniers. Mieke's Laws of Oleron. 6. f. 12.

Mieke's
Laws of
Wisby 17.
f. 24. S. P.

5. If the master strike any of his mariners, the mariner ought to bear with the first stroke, whether it be with the fist or open hand; but if the master do strike more than once, the said mariner may defend himself. Mieke's Laws of Oleron. 6. f. 12.

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6. If a mariner, whether he be a pilot, mate, or common seaman, being hired by a master, does afterwards leave him; the said mariner ought to restore so much of the pay as he hath received, and withal pay a moiety of the salary agreed upon for the whole voyage. Mieke's Laws of Wisby 14. f. 1.

7. And, if a mariner binds himself to two several masters, the first that hired him may challenge him, and compel him to go the voyage. Nevertheless the said master shall not be obliged to pay him any wages or salary for the whole voyage, but that is left to his discretion. Mieke's Laws of Wisby. 14. f. 1.

8. Any pilot, mate, or common seaman, that does not understand his place, or is not sufficiently qualified for it, shall be bound to restore to the master what money he has advanced him, and withal the moiety of what has been agreed upon. Mieke's Laws of Wisby. 15. f. 2.

9. All mariners are forbidden to lie ashore in the night without the master's leave, and that under the penalty of 2 deniers. They are also prohibited under the same penalty, to go off in the ship boat by night. Mieke's Laws of Wisby 15. f. 4.

10. The mariners (or seamen), that are to be paid out of a certain proportion of the freight, are obliged to attend the ship, in case the said ship finds no freight at the place appointed, and that she must go further to find a freight. But the seamen that have

have a *set salary* shall be considered according to equity. Miege's Laws of Wisby 18. f. 32.

Miege's
Laws of Oleron 8.

f. 20. S. P.

But if any of
their com-

pany be

hurt for

want of their

help, they

shall bear so much of the charge of his recovery as one of his fellow mariners, or the master with those of the table shall judge or arbitrate.———* S. P. Mal. Lex. Merc. 104, cap. 23.———

S. P. Molloy. 242.

11. The *ship having cast anchor*, the seamen are free to go on *shore* one after another, or two at once, and there they * may carry their dinner, and a competent proportion of bread, but no drink. However they ought not to make a long stay there; for, if either the ship or the lading thereof, should receive any damage by reason of their absence, they are bound to make it up. Miege's Laws of Wisby 18. f. 33.

12. And, if any of the men should chance to hurt himself, or get any *mischance in doing any business relating to the ship-service*, the merchant must be at the charge of his cure, and ought to indemnify him, upon the testimony of the master, pilot, or mariners. Miege's Laws of Wisby 18. f. 33.

13. Mariners are not only to discharge and *deliver goods out of the ship*, but also, if no porters nor carriers be in those parts, to carry the same themselves for such hire as other workmen should have had therefore. Mal. Lex. Merc. 105. cap. 23.

(E) Privileged, or indulged. How.

Miege's

Laws of

Oleron. 5.

f. 6. S. P.

S. P. But if

it be occasioned by another on ship-board, the master may refund the damage out of his wages, but still remembering who gave the first assault. Molloy. 242.

1. [IF a mariner, being *ashore about the master's or the ship's business*, happen to be wounded, the ship shall be at the charge of his cure. Miege's Laws of Wisby 16. f. 18.

[240]

2. But if he went to shore for his pleasure, and there be wounded, the master may put him away; and the said mariner shall be bound to make restitution to the master, of what he shall have received from him, and pay him, moreover, whatever he must give another to take his place. Miege's Laws of Wisby 16. f. 18.

* Or else

hire a wo-

man to at-

tend him;

he shall

likewise

afford him

such diet as

is used in

the ship, and the same quantity that was allowed him when he was in health, and no more, unless it please the master to allow him more; and if a better diet be required, the master shall not be bound to provide it for him, unless it be at his own costs and charges. In case the ship be ready for her departure, she ought not to stay for the said sick party. Miege's Laws of Oleron 5. f. 7.—

† S. P. Only deducting the master's charges, which he laid out upon him. Molloy. 243.

3. In case a mariner falls sick, and that it is thought convenient to carry him to shore, the law is, that the said mariner shall be there kept and maintained, as if he were on board, and attended by a * ship-boy. † If he recover, his wages shall be paid him to the full; and if he dies, his wages shall be paid to his widow, or to his next heir. Miege's Laws of Wisby 16. f. 19.

4. A mariner may keep either his portage in his own hands; or put forth the same for freight, and yet the ship shall not stay upon the lading of his portage, so that in case the ship be fully laden before the goods for his portage be brought in, he shall only have the freight of so much goods. Mal. Lex Merc. 104, 105. cap. 23.

5. If a mariner be hired for a simple mariner, and afterwards in the voyage finds hiring to be a pilot or a master, he may pass, restoring his former hire; and so it is if he marry. Lex Merc. 105. cap. 23.

6. If it happen a ship to be prized for debt, or otherwise to be forfeited, yet the mariners hire is to be paid, and if she prosper, to receive their pay in the same money that the freight is paid with. Mal. Lex Merc. 105. cap. 23.

7. A mariner should neither be arrested, or taken forth of a ship making ready to sail, for any debt; but only his hire, and as much other goods, as he hath in the ship, may be arrested for it according to the value of the debt, and the master to be answerable for all; because the ship is compared to man's dwelling house, which is his sure refuge by the law, except it be for a sworn debt, or a penalty to the king through some crime. Mal. Lex Merc. 105. cap. 23.

S. P. Yet this is doubted if it be not on a sworn debt, viz. a judgment or sentence, or a penalty to the King. Molloy 243.

(F) Punishable.

1. If any of the hired mariners strike the master first, he shall pay an hundred sous, or * lose his hand. Mieke's Laws of Oleron. 6. f. 12.

* S. P. if on ship-board, unless he redeems it at

5 solz. Molloy. 244. — Ibid. 246. S. P.

2. If in hoisting up of wines they chance to leave open any of the pipes, or other vessels, or that they fasten not the ropes well at the ends of the vessel, so that the vessel slips and falls, and so is lost, or that falling on another vessel both are lost; in these cases, the master and mariners are bound to make them good to the merchants; and the merchants must pay the freight of the said damaged or lost wines; because themselves are to receive for them from the master and mariners according to the value that the rest of the wines shall be sold for; and the owners of the ship ought not to suffer hereby; because the damage happened by default of the master and mariners in not fastening the said vessels of wine. Mieke's Laws of Oleron. 9. f. 26.

3. When a mariner is fled from his master, and is run away with the money he received from him, if the said mariner can be secured, his trial shall be made; and upon the evidence of two other mariners, he shall be sentenced to be hanged. Mieke's Laws of Wisby 20, 21. f. 61.

If a mariner run away with his hire undelivered, he deserves the gallows.

Mal. Lex. Merc. 105. cap. 23.

4. According to the law of Oleron, mariners owe all *due obedience to the master*, not only in flying from him in his wrath, so far as they can, but also in suffering; yet may they after one stroke defend themselves. Mal. Lex. Merc. 104. cap. 23.

S. P. Molloy. 242.—

But if in this strife

a mariner

useth any

armour or

weapons,

then should the rest of

the mariners bind him, imprison him, and present him to the justice; so that if *any refuse to assist*, he shall lose his hire and all things else he hath within ship-board; yea, in case any number of the mariners would *conspire and force the master to pass to any other port than to the which he was freighted*, they may be accused criminally and punished as for a capital crime. Mal. Lex. Merc. 104. cap. 23.

6. Mariners, in a strange port, should not leave the ship without the master's licence, or fastning her with 4 ropes, else the loss falls upon them; they are also to attend the ship until she be discharged and ballasted new, and the tackle taken down; and if a mariner, during the time of her discharge and lading, labour not with the rest of the company, but goeth idle, and absents himself, he shall pay a fine to the rest of the company pro rata; in a strange country the one half of the company at the least, ought to remain on ship-board, and the rest who go on land should keep sobriety and abstain from suspected places, or else should be punished in body and purse, like as he who absents himself when the ship is ready to sail; yea if he give out himself *worthier than he is in his calling*, he shall lose his hire, half to the admiral and the other half to the master; but this especially ought to be executed against an unworthy pilot. The mariner also forfeits his hire, if the ship breaks in any part, and he help not with all his diligence to save the goods. Mal. Lex. Merc. 104. cap. 23.

S. P. for such accidents are not done in the service of the ship. Molloy 243.

7. If some of the mariners that hired themselves with the master go out of the ship without the master's leave, and make themselves so drunk as to occasion wrangling and fighting, whereby some happen to be wounded; in such case the master is not bound to get them healed, or in any thing to provide for them; on the contrary, he shall be free to discharge them, and to turn them out of the ship, both them and their assistants; and if they come to reckon, they must make up whatever they remain owing to the master. Mieke's Laws of Oleron 5. f. 6.

8. An action lies against a mariner for any wilful or negligent fault committed by him whereby the master or owners of the ship are answerable to the merchant. Molloy 245.

The lieutenant of a man of war

may give moderate correction to a seaman, but not wound him; for that is not moderate correction; per Holt Ch. J. 12 Mod. 504. Pasch. 13 W. 3. Anon.

9. The master may give moderate and due correction to his mariners and may justify the same at common law. Ibid. 246.

10. Seamen *impressed* ought not to be put into a gaol; they could be kept in an inn or other convenient place till there be a competent number of them to be conducted. 5 Eliz. 5. 27. makes it *felony* for seamen impressed in time of war to *desert*. Cumb. 245. Pasch. 6 W. & M. B. R. The King v. King & al.

Market.

[2-2]

* (A) Market Overt [*as to altering the Property.*]

See (E)—
* There is no letter at Roll to this division but for the more regularity I have put it as here, and what is (A)

[1.] If a man *sells a jewel to a goldsmith in a shop in the market* which is *not a goldsmith's shop*, but another shop which is not proper for this but for other commodities, this sale shall not alter the property. Tr. 43 El. B. R. adjudged between Sir Jervis Clifton and Chaundler.]

in Roll will here be made (A. 2)—Mo. 624. S. C.—D. 99. b. Marg. pl. 66.

[2. If *plate* be sold in the market in a *scrivener's shop*, this does not alter the property; for this is not any proper place for men to inquire for such thing, and the laches of inquiry is the cause that the owner is bound by it. Tr. 43 El. B. R. cited to be adjudged.]

S. P. otherwise if it were in a goldsmith's shop, where plate is usually bought

and sold. Mo. 360. Mich. 36 & 37 Eliz. the Bishop of Worcester's Case.—S. P. cited Mo. 615. as a resolution at Newgate, anno. 37 Eliz. the Bishop of Worcester's Case.—S. P. for tho' a shop in London is a market overt every day except Sundays and Holydays, yet it is only for buying such goods as are agreeable to the trade of the shop where &c. Cro. J. 68. Pasch. 3 Jac. B. R. Taylor v. Chambers.—Cro. E. 454. Mich. 37 & 38 Eliz. Palmer v. Wolley.—5 Rep. 83. b. Hill. 38 Eliz. Case of Market Overt.—Het. 63. Mich. 3 Car. C. B. in Case of Panton v. Haffell.

[3. If a man sells things in a *proper shop* for it, yet if the shop be *obscured with a curtain at the time of sale*, this does not alter the property; for it is not any shop overt. Tr. 43 El. B. R. cited to be adjudged.]

S. P. so where a shop contains an outer room and an inner room, the

sale in the inner room does not alter the property. Mo. 360. Mich. 36 & 37 Eliz. in the bishop of Worcester's Case.—So where *any of the windows of the shop are shut*. Ibid.—D. 99. b. marg. pl. 66. cites it as resolved by all the justices C. B. 9 Jac. Frogmer's Case.—Foph. 84. S. P.—5 Rep. 83. b. Case of Market Overt.—Het. 63. in Case of Panton v. Haffell.—* S. P. Mo. 625. in Case of Sir Jervas Clifton v. Chancellor.—Also it seemed to the justices that tho' the shop is by custom a market overt, yet it is not to alter the property of a stranger, as overt market shall do, Ibid.

Sale in market overt in London ought to be in a shop which is

[4. If a man sells a thing in a *proper shop*, but it is in a corner of the shop only, this will not alter the property, tho' the shop be overt; for this place where it is sold is not overt. Tr. 43 El. B. R. adjudged between Sir Gervas Clifton and Chandler.]

open to the street, and not in chambers, or inner rooms, otherwise the property is not altered, per Anderson. Godb. 131. pl. 148. Hill. 29 Eliz. C. B. Anon.—It ought to be in the outer part of the shop, so that people that pass by may see it. D. 99. b. marg. cites Pasch. 3 Ja. B. R. Taylor v. Chambers.

Lord Coke says that the common law did hold it for a point of great policy, and behoveful for the commonwealth, that fairs and markets overt should be replenished and well furnished with all manner of commodities vendible in fairs and markets for the necessary sustentation and use of the people; and to that end the common law *did ordain* (to encourage men thereunto) *that all sales and contracts of any thing vendible in fairs or markets overt should not only be good between the parties, but should bind those that had right thereunto.* But this rule hath many exceptions.—1st. It shall not bind the King for any of his goods sold in market overt by any person; but regularly the sale by a stranger in market overt binds an *infant*, a *feme covert*, that hath right, either in their own right, or as executors or administrators, *ideots*, *non compos mentis*, men *beyond sea* and *in prison*, that have right to the same.—2d. Prout pl. 3. and in notis.—3d. Prout pl. 2.—4th. It must be a sale, and not a free gift without any valuable consideration. For fairs and markets were not instituted for gifts, but for sales; therefore gift in this act is to be intended of a gift for a valuable consideration, and not a free gift.—5th. If the *buyer doth know whose goods they were*, and that the seller thereof hath at the most but a wrongful possession, this shall not bind him that hath right.—6th. **** If they be sold *by covin* between two of purpose to bar him that has right, this bars not.—7th. If a sale be made of goods *by a stranger* in a market overt, whereby the right of A. is bound, yet if the seller acquireth the goods again, A. may take them again, because he was the wrong doer, and he shall not take advantage of his own wrong.—8th. There *must be sale and contract*; and therefore a sale to a man of his own goods in market overt bindeth not; and likewise a sale in market overt *by an infant* of such tenderness of age, as it may appear to the buyer that he is within age, or by a *feme covert*, if the buyer know her to be a *feme covert* (unless for such things as she usually trades for, or by the consent of her husband) binds not.—9th. The contract must be *originally and wholly made in the market overt*, and not to have the inception out of the market, and the consummation in the market.—† 10th. By the common law the property was altered (tho' some opinions be to the contrary) by sale in market overt *albeit no toll was paid* either in respect of the freedom of the fair or market, wherein no toll at all was to be paid, or for that many were discharged of payment of toll, as the King, and some of his subjects by charter, and some by tenure, as ancient demesne &c. where toll of others was to be taken.—11th. The sale must not be *in the night*, but between the rising of the sun and the going down of the same; for he that hath a fair or market, either by grant or prescription, hath power to hold it per unum diem seu duos, vel tres dies &c. where (dies) is taken for *dies solaris*; for if it should be taken for *dies naturalis*, then might the sale be made at midnight; and yet the sale that is made in the night is *good between the parties*, but not to bind a stranger that has right.—12th. A. commits a robbery or felony of the goods of B. the officer of the King doth seize the goods (in lawful manner) to the King's use, B. pursues his appeal freely, the King's officer, or any other *sells the goods in market overt*; B. *pursues his appeal* against A. until he has convicted him of the felony; the King shall make him restitution of his goods, notwithstanding the sale in market overt, because of the *fresh* and diligent *suit* and pursuit of record, the goods were so protected thereby, and by the King's seizure, that the property of the same, being *tanquam in custodia legis*, cannot be altered by sale in market overt. 2 Inst. 713, 714.—And none of these 12 exceptions are abrogated by any act of parliament, but yet remain in full force. Ibid. 714.—* S. P. Br. Collusion, pl. 4. cites 33 H. 6. 5.—Br. Trespass, pl. 26. cites S. C.—Br. Property, pl. 6. cites S. C.—S. P. 2 And. 115 Arg. cites S. C.—5 Rep. 83.—S. P. Palm. 486. Arg. —* S. P. Br. Property, pl. 6. cites 33 H. 6. 5.—† S. P. for it cannot be good unless the property be altered thereby, and that cannot be; for before the sale, and at the time of the sale, the property was in me, and then if it shall be altered by the sale it ought to be altered in me, and that shall be impertinent; for then it should be altered out of me immediately in &c. Perk. S. 93.—† Jenk. 83. pl. 62.—‡ S. P. Br. Property, pl. 39. cites 9 H. 6. 45.—Property of goods is not altered by sale in market overt, unless toll be paid, per Prisot and Fortescue Ch. J. but Brook says quære. Ibid. pl. 9. cites 35 H. 6. 29.

5. Selling horses in Cheapside, or cloth in Smithfield market, does not alter the property. Mo. 360. Mich. 36 & 37 Eliz. in Bishop of Worcester's Case.

6. The Queen cannot grant to one, that his shop shall be a market

market overt to bind strangers; because against the law. Mo. 925. Mich. 42 & 43 Eliz. Sir J. Clifton v. Chancellor.

7. Seller in market overt enters a false name in the toll book; per 2 justices, this is no good sale to bar the plaintiff. Owen 27. Mich. 30 Eliz. Gibbs v. Basil.

31 Eliz. 12. makes the sale void.—The sale is clearly good.

and the property altered, if there is no *covin* in the vendee; for the misnomer is nothing to him when he buys it bona fide, and is not consant to the tortious taking. Cro. E. 86. Hill. 30 Eliz. B. R. Wikes v. Morefoot.—It is not good; per Cur. Le. 158. Mich. 31 Eliz. C. B. Gibb's Case.

8. In case of piracy, buying in a market overt without fraud would defend the buyer. Hob. 79.

9. Custom of sale in market overt, where toll ought to be paid does not take away property, unless toll be paid; but otherwise where toll is not used to be paid. Jenk. 83. pl. 62.

Het. 49. Hodges v. Franklin.

10. Goods of bankrupt remain liable to the sale of commissioners, notwithstanding bankrupt sold them in market overt; per Twifden J. Sid. 272. Trin. 17 Car. 2. B. R. in Case of Bailly v. Bunning.

11. Trover was brought of a silver cup against a goldsmith in the Strand, and it appeared his apprentice had bought it in the shop; and per omnes, sale of goods in a shop in the Strand, or elsewhere out of London, does not alter the property. 12 Mod. 521. Pasch. 13 W. 3. Anon.

Nor, per Holt Ch. J. even in London, if the felon be convicted upon the owner's evidence.

But because he could not prove a demand of the master, but only of the apprentice, he was nonsuited. The reason why it alters property in London is, because sale in a shop there is in market overt. 12 Mod. 521.—and see Keling. 48.

(A. 2) Market. Fair. * Clerk of the Market. The [244] Antiquity, [and his Power.] Of the Measures of England.

Fol. 123.

1. ROT. patentium 1 E. 1. membrana 3. Roger de Wanton associatur Johanni de Swineford ad placita mercati tenenda eo quod Robert Ledet nuper associatus propter infirmitatem &c. dicto officio ad presens vacare non potest ad videndum & examinandum assisas panis & cervisie &c.

* He is to this day called Clericus Mercati Hospitii Regis; for of ancient time, there was a con-

tinual market kept at the Courtgate, where the King was better served with viands for his household than by purveyors, the subject better used, and the King at far less charge in respect of the multitude of purveyors &c. And the officer of the market of the King's household retaineth his name still, altho' the good end thereof according to the first institution ceaseth. 4 Inst. 273.

[2. Statutum de forma mittendi extractas ad Scaccarium in Magna Charta 2 parte fo. 49. b. item. Be the clerk of the market and of measures charged and commanded to * deliver the estreats of that which touches his office in the form under-written.]

* S. P. And he keeps a Court and inquires of weights and measures,

whether they be according to the King's standard or no, and for that purpose he makes process to sheriffs and bailiffs to return pannels before him &c.—4 Inst. 273.

The King's clerk of the market is the King's

3. *W. 1. 3 E. 1. cap. 26.* Enacts that no sheriff or other minister of the King shall take any reward for doing his office &c. minister, and therefore he is within the purview of this statute. 4 Inst. 274.—But in 8 R. 2. in open parliament a grant was allowed to him for marking and sealing of every bushel, two pence for every half bushel, and one penny for every peck, and so according to that rate. 4 Inst. 274.—It was resolved by all the judges of England, that no fee was due to the clerk of the market for view and examination only of weights and measures. Ibid.—And the clerk of the market cannot set any price upon any thing saleable in the market; for that belongs not to weights and measures. Ibid. 275.

4. The clerk of the market shall hold no plea, but such as were holden in the reign of E. 1. And at this day there is no great need of him; for the justices of assize, the justices of oyer and terminer, justices of peace, and the sheriffs in their tourns, and the lords in their leets, may and do inquire of false weights and measures. 4 Inst. 273.

(A. 3) Markets and Fairs, *what they are.*

1. A Fair (from forum or feriae) is a great sort of market granted to any town &c. for buying or selling, and for the more speedy and commodious provision of such things as the subject needs. It is usually kept once or twice in the year. A mart (a merce or mercando) is a great fair holden every year. 3 R. S. L. 172. cites 2 Inst. 221.

* S. P. 2
Inst. 406.

2. A market (from mercando, buying and selling) is less than a fair, and granted to a town &c. for the like purposes, but chiefly for the provision of such victuals as the subject wants. This is usually kept once or twice in the week; so that * every fair is a market, but every market is not a fair. 3 R. S. L. 172.

[245]

(B) Fair. Stallage.

Tolatum may well signify stallage as a general word for such duties and payments.

2 Litt.

15 C.—

Pasch. or Trin. 12 W. 3. C. B. Bennington v. Taylor

[1.] If a man has a fair in a place, those who have houses next adjoining to the fair cannot open their shops to sell commodities in the fair, but stallage is due for it; for they cannot take benefit of the fair without giving the duties which appertain to him who has purchased it. M. 15 Ja. B. R. in *Newington Fair's Case* in Cambridge, per Cur. But Doderidge was e contra at a day before.]

[2. The lord of a manor may prescribe to have the 8th part of a bushel of corn in four bushels which are brought to market within the manor, nomine tolomii for stallage sold or not sold, and it is a good prescription tho' it be to have it in specie. Tr. 43 El. B. R. per Curiam, *Hickman's Case*.]

3. The stallage must be certain. Arg. 2. Show. 266. cites 9 H. 6. 45. pl. 28.

(B. 2)

(B. 2) Stallage. *Who shall have it as Heir. Borough English.*

1. **S**Tallage and piccage is incident to the soil. Mo. 474. Mich. 39 & 40 Eliz. B. R. in Case of Heddy als. Hoddy v. Wheelhouse.—And therefore if the King grants fair or market with toll certain to one and his heirs to be held within *borough English land*, and the grantee dies, the heir at common law shall have the fair or market, and the toll. But the younger son shall have piccage and stallage, with the soil by the custom. Ibid.

(C) Fair. *What Things Strangers may do.*

[1. **I**F a man has a market in one part of the vill of D. the inhabitants of the other part of the vill cannot erect new houses, and there in their houses and stalls sell merchandises; for this is to the damage of the market. 2 E. 2. admitted.]

2. Case lies for erecting a market to the damage of the plaintiff's market, tho' the place is seven miles distant, and not on the same day of the week. Vent. 98. Mich. 22 Car. 2. B. R. Sard v. Ford.—Lev. 296. S. C. by name of Yard v. Ford.—2 Saund. 172. S. C.

3. It was adjudged upon demurrer, that the inhabitants of one market town may sell goods in another market town, and are not prohibited by the stat. Ph. & M. which extends only to those who live in country towns, and come and sell their goods in market towns. 2 Lev. 89. Trin. 25 Car. 2. B. R. Davis and Leving.

4. *Quo warranto* against several bakers that came in and sold bread at G. near the city of C. for selling there extra shopam, et absque aliquo mercat. in loco aperto & tanquam mercat. But resolved. not good, because it is no encroachment without a demand of toll &c. and if it had been for keeping a market, they would have disclaimed, and judgment for the defendants. 2 Show. 201. Pasch. 34 Car. 2. B. R. The King v. ----

(D) Fair.

[246]

[1. **I**N *US mundinarum a senatu aut a principe impetrandum est.* Arodii Decreta, libro. 20, 133.]

Fol. 124.

Vol. (A)

* S. P. that the property is not altered, unless the course prescribed by the statute 31 Eliz. 12. be observed, per 3 J. against one. 1 Jo. 164. Mich. 3 Car. B. R. Barker v. Redding.—D. 99. b. pl. 66.—† S. P. Per Gaudy J. Goldsb. 164.

(E) *What shall be Contract in Market-overt to change Property.*

[1. **A** Man * *bargains out of the market* to have goods for 10l. and that the buyer shall have *election to like or dis-like the next day, and at the same time gives 5s. in earnest, and the day after he agrees to the bargain, and pays the toll; yet because it has † relation to the first contract, it does not change the property.* Dy. 1 Ma. 99. 68.]

2. Every factor of common right is to *sell for ready money, but if he be a factor in a sort of a dealing or trade, where the usage is for factors to sell on trust, there if he sells to a person of good credit at that time, and he after becomes insolvent, the factor is discharg'd; but otherwise if it be to a man notoriously discredited at the time of the sale.* But if there be no such usage, and he, upon the general authority to sell, sells upon trust, let the vendee be ever so able, the factor is only chargeable; for in that case, the factor having *gone beyond his authority*, there is no contract created between the vendee and the factor's principal, and such sale is a conversion in the factor; and if it be not in market-overt, no property is thereby altered, but trover will also lie against vendee. So likewise, if it be in a market-overt, and *vendee knows the factor to sell as factor; per Holt Ch. J. at Guild-hall. 12 Mod. 514, 515. Pasch. 13 W. 3. Anon.*

See Franchises (B)

(F) *Fair. Forfeiture. What Act or Thing shall be a Forfeiture.*

* Orig. [Pertant.]

[1. **W**HEN *diverse franchises are granted to one man, and neither is dependant upon the other; in such case, tho' he misuse one franchise, * yet by this the others shall not be forfeited, but only this franchise which he has ill used.* 22 Aff. 34.]

[2. *If all the points of the franchise depend upon one and the same franchise, which comprehends several articles; in such case, if he misuse any of the points, the entire franchise shall be forfeited.*]

* Orig. (Purprent.)

[3. *If a man has a franchise, and uses it as he ought, and over and above * incroaches further upon the King; in this case the franchise, which he has well used, shall not be forfeited.* 22 Aff. 34.]

[4. *As if a man has a market to hold every week on a Friday, and he holds the market the Friday, and also Monday; in this case nothing shall be forfeited but that which he has encroach'd.* 22 Aff. 34.]

[5. *But*

[5. But if a man has a fair to hold 2 days in a year, and he holds it three days, he shall forfeit the whole. 22 Aff. 34.—21 E. 1. Liber Parliamentorum. 47. The Bishop of Winchester's Case, [that he] shall forfeit all the fair for holding it beyond the time limited.]

2 E. 3. 15. prohibits the keeping a fair longer than he ought on pain of be-

ing seised into the King's hands till he have made fine for so doing.

[6. If a man has a market to hold upon Wednesday, and he holds it of another day, and not upon the Wednesday, the franchise shall be forfeited. 22 Aff. 34.]

7. An abuser of the toll is a forfeiture of the market. 2 Show. 265. cites Corporation of Maidenhead's Case.—Palm. 76, 77, 78.

8. Misuser of a piepowder court or toll is a forfeiture of the market or fair it self. 2 Show. 276. Hill. 34 & 35 Car. 2. B. R. Arg. so agreed by counsel of both sides in Case of Quo Warranto.

(F. 2) Fairs. Goods sold there, or the Value &c. of them forfeited in what Cases.

1. 5 E. 3. 5. IF any merchant sell any ware or merchandize at a fair after the time of the fair ended, he shall forfeit double the value of the goods sold; one fourth part thereof to the prosecutor, and the rest to the King.

(F. 3) Proceedings, Pleadings, and Judgment. How.

1. QUO warranto for the King against A. B. to shew quo warranto he claim'd market in T. in præjudicium &c. The writ was returnable in B. R. 15 Pasch. and the defendant made default, and at the venire facias he made default likewise at Oñab. Trin. And before all the justices in the exchequer chamber, the question was, if he shall forfeit his market or not? And per Tremain J. he shall forfeit his market; for the statute wills, that if the defendant does not come at the venire facias return'd, that it shall be done as shall be done in eyre; and before the justices in eyre, if the defendant does not come, the franchise shall be seised into the hands of the King nomine districtionis, and if the party who ought to replevy the franchise does not come during the eyre in the same county, he shall forfeit his franchise for ever; and so per Hervey in the eyre of Kent. And therefore all this term that the venire facias is returnable he may come and replevy his franchise, but not after this term; and Catesby and Littleton accordingly, that it shall be forfeited if he does not come during the eyre. But they did not speak these words (in the same term) as Tremain said; but per Needham, in B. R. he shall not forfeit at any time,

time, but may replevy it; for tho' the eyre determines, yet B. R. does not determine. But the others e contra; and if he does not come in the same term, in which the venire facias is returnable, that the liberty is forfeited. Brian said, that the judgment shall be that the market shall be seised into the hands of the King, and this shall enure by way of extinguishment. As if I grant a market to the King, which the King had granted to me, this is extinct. Br. Quo Warranto, pl. 11. cites 15. E. 4. 7.

2. If the party had continued the market by tort, and not by title, the judgment shall be that the market shall be ousted. Ibid. per Billing.

3. But if he had title, as by grant of the King or the like, the judgment shall be that it shall be seised. Ibid.

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4. And in writ of nuisance for holding of a market to the nuisance of his market, judgment was given that the market of the defendant should be seised. Ibid.

5. But here it does not appear if the defendant had held his market by right or by wrong; therefore there is better reason to give judgment that the market shall be seised; per Billing; and with this agreed the other justices as to the judgment. Ibid.

6. Quare, whether when market is forfeited in eyre and seised into the hands of the King, the King shall hold it as a market? for it is extinct; per Brian. Ibid.

(G) Fairs. In what Place may or must be kept.

1. 13 E. 1. Stat. of ENacts that fairs and markets shall not be kept in church-yards. Winton cap. 6.

But if the King name a place certain which may be not convenient for the country, yet the subjects can go to no other, and if they do, the owner of the

2. In the case of Wey-hill fair it was said per Jefferies Ch. J. that if the fair belongs to Andover, they may choose whether they will keep it at any place, and that may create another question, whether they may not forfeit this franchise by disuser? But certainly, if the place be not limited by the King's grant, they may keep it where they please, or rather where they can most conveniently; and if it be so limited, they may keep it in what part of such place they will. 3 Mod. 108. Pasch. 2 Jac. 2, B. R. Dixon v. Robinson.

soil where they meet is liable to an action at the suit of the grantee of the market. Arg. 3 Mod. 127. Trin. 2 Jac. 2. B. R. in Case of the Company of Merchant Adventurers v. Rebow.

(H) Market. What Place shall be said the Market.

1. IN an information upon the Stat. 5 & 6 E. 6. 14. of buying seed-grain, &c. it was held, that if corn be in the market, tho' the contract be made in a house out of the market, and deliver'd to the vendee out of the market, yet it is within the statute. And per Anderson, the market shall be said the place is the

the town where it hath used to be kept, and not every place in the town. Godb. 131. pl. 148. Hill. 29 Eliz. in C. B. Anon.

2. If one buys in a shop in *London* any thing which appertains not to his trade, as to *buy plate in a mercer's or draper's shop*, it is not a market overt to alter the property. So if the sale be in a *back shop*, or in another place not open, no property is alter'd; per Anderson. Cro. E. 454. Mich. 37 & 38 Eliz. in Case of Palmer v. Wolley.

3. In case of *toll* to be paid for things brought to market *the vill* shall be taken for the market; per Powell. J. 2 Lutw. 1502. Hill. 12 W. 3. in Case of Kerby v. Whichelow.

(H. 2) *What Things may be sold out of the Market.*

1. **T**Respals by the prior of D. where he and his predecessors time of mind have had market in D. such a day, and the correction of the market, and that butchers and others who sell victuals shall sell in the high street upon the stalls of the plaintiff by him assign'd for them, for which the plaintiff shall have one penny a day for every stall, and that the defendant sold in his house, by which the plaintiff lost his advantage of the stalls, and correction of the victuals of the defendant, being a butcher &c. and admitted for a good prescription. The defendant prescrib'd that he and all householders of D. have used to sell in their houses, and the opinion was that this is an ill prescription; for he does not deny the market of the plaintiff, and also by this means the plaintiff shall lose his toll and correction, and also market shall be overt and not privy. Quære, if householders may prescribe. Br. Prescription, pl. 98. cites 11 H. 6. 19.

For the market must be in open place where the owner [249] may have the benefit of it. 3 R. S. L. 172. cites 4 Inst. 272. but I do not find it there.

2. And after the defendant prescribed the custom of the vill to be, that every burgess seised of any house adjoining to the high street may sell in his own house, and that he is a burgess, and was seised of a house adjoining to the said street, and sold &c. Ibid.

(I) *Grants or Patents for Fairs or Markets.*

1. **I**F one has a fair or market, either by prescription or by letters patents, and another obtains a market to the nuisance of the former market, he shall not stay till he have avoided the letters patents of the later market by course of law, but he may have an *assise of nuisance*. 2 Inst. 406.

See Nuisance (G)—Prærogative (T. b.) (C. d) —Ad quod damnum.

2. Tho the words in the grant of a market be *nisi sit ad nocu-mentum feriarum vicinarum*, these are put but for example; for if it be *ad aliquod dampnum* either of the king or subject in any other thing, the fair shall be revok'd. 2 Inst. 406. cites Pasch. 33 E. 1. Prior of Tinmouth's Case.

3 Lev. 221. the King v. Butler.

3. It was objected, that an *ad quod damnum* was not necessary upon

upon grant of a market, but the patent might be granted without it, and therefore if it be surreptitious it is not material. But the judges resolv'd, that what is always done in pleading is necessary to be done; but it may be *dispensed with by non obstante*, because there the King takes upon him notice, that it is not *ad damnum* &c. Yet if it be *ad damnum*, the patent is void; for in all such patents it is a *condition imply'd*, that it is not *ad damnum* of the neighbouring markets. 3 Lev. 222. Trin. 1 Jac. 2. C. B. The King v. Butler.

(I. 2) Of the Manner of holding and warning a Fair.

1. 2 E. 3. 15. **E**Naets that every lord at the beginning of his fair shall cry and publish how long it shall endure, on pain to be grievously punished.

2. 5 E. 3. 5. Merchants after the fair ended shall close their shops and sell no ware thereafter, in pain to forfeit to the King the double value of the ware so sold, whereof the prosecutor shall have a fourth part.

(I. 3) On what Days.

[250] 1. 27 H. 6. 5. **E**Naets that fairs and markets shall not be kept upon Ascension-day, Corpus Christi, Whitsunday, Trinity-Sunday, the Assumption of the Virgin Mary, All Saints, Good Friday, nor any Sundays, (the four Sundays in harvest only excepted) in pain to forfeit the wares so shewed to the lord of the franchise there.

Howbeit they may be kept within three days next before or after the said days proclamation thereof being made beforehand, which is to be certified without fine or fee to the King, and such as have by special grant sufficient days before or after the said feast may keep their full number.

Sec (A) (I. 4) Of the Toll Book-keeper, and Property altered by Sale, in Market-overt or Fair.

1. 2 & 3 P. & **E**Naets that the owner, farmer, steward, bailiff, or chief keeper of every fair and market-overt, shall yearly appoint one certain place, where horses shall be used to be sold, in which place there shall be, by the keeper of the fair or market, appointed one or more to take toll, and keep the place from ten before noon until sun-set, upon pain to forfeit 40s. and every toll-gatherer shall, during the fairs and markets, take toll for every such horse &c. at the said place betwixt the hours of ten in the morning and

and sun-set, and not at any other time or place; and shall have before him at the taking of the toll the parties to the bargain of every such horse &c. and also the horse &c. sold, and shall then write in a book the names and dwelling-places of all the parties, and the colour with one mark at least of every such horse &c. on pain to forfeit 40s.

S. 3. The toll-gatherer or keeper of the book shall within one day after such fair or market deliver his book to the owner &c. of the fair or market, who shall then cause a note to be made of the number of all horses &c. sold there, and subscribe his name, or set his mark thereunto, upon pain to forfeit 40s. and also to answer the party grieved.

S. 4. The sale or exchange in any fair or market-overt of any horse &c. stolen shall not alter the property, unless the same shall be in the fair or market openly ridden, or kept one hour at least betwixt ten in the morning and sun-set, in the place wherein horses are used to be sold, and unless all the parties shall come together, and bring the horse to the open place appointed for the toll-taker &c. and there enter their names and dwelling-places with the colours, and one mark at least, of the horses &c. in the toller's or keeper's book; and also pay him their toll, if they ought to pay any; if not, then the buyer to give 1d. for the entry in the book.

S. 5. If any horse that is stolen be sold or exchanged in any fair or market, and not used according to this statute, the owner of such horse may seize the said horse, or have an action of detinue or replevin for the same.

S. 6. The one half of all which forfeitures to be to the King, and the other to him that will sue for the same before the justices of peace, or in any of the ordinary courts of record by bill &c.

S. 7. The justices of peace shall have authority in their sessions to inquire, hear and determine all offences against this statute.

S. 8. Where toll is not due, the keeper of the book shall take but 1d. upon every contract for writing the entry.

2. 31 Eliz. cap. 12. s. 2. Every seller or exchanger of an horse &c. in a fair or market, being unknown to the toll-taker or book-keeper, shall procure one credible person, that is well known unto him, to vouch the sale of the same horse; also the names of the buyer, seller and voucher, and the price of the horse shall be entered in the toll-book, and a note thereof delivered to the buyer under the toll-takers or book-keepers hand, for which the buyer shall pay 2d. and every false voucher, and the toll-taker or book-keeper, that suffers such sale or exchange to pass contrary to this act, shall forfeit 5l. to be divided betwixt the Queen and the prosecutor. And besides, the sale of such horse shall be void.

This act is but an act of addition to the common law, and to the act of 2 & 3 Ph. & M. cap. 7. all standing in force, and must be pursued. 2 Inst. 719.—This

branch extends to all sales of horses in market-overt, whether the horse &c. be stolen or not stolen. 2 Inst. 717.—In trover of an horse, a special verdict was found that B. was possess'd of an horse, and lost him, and that he was afterwards sold in Smithfield-market by C. known to one J. S. unto D. to the use of the defendant, prout per copiam intrationis inde in libro tincti usualiter capt. & reservat. apparet. And they find further, that nul tiel in rerum natura at the time of the sale nec quod unquam fuit aliqua talis persona in rerum natura, as J. S. and that the horse came to the hands of the defendant, and he converted him &c. But nothing was found as to the horse being stole; and this matter being objected, the Court conceived it to be a case of great consequence [251]

sequence and hardship, be the resolution one way or other. For it is difficult for the vendee to know the vendor, and so it is for the owner, who lost the horse to prove it to be stolen, tho' it really be so. And therefore three justices agreed that the plaintiff have judgment; for tho' the preamble be of horses stolen, yet the parview is general. Palm. 485. Mich. 3 Car. B. R. *Barker v. Redding*.

S. 3. Justices of peace in sessions have power to hear and determine those offences.

The clause of redemption in this statute extends to no other but stolen horses. Agreed by all the justices. Palm. 489. Mich. 3 Car. B. R. in the Case of *Barker v. Redding*.

S. 4. Notwithstanding such sale and voucher, as aforesaid, the right owner or his executors may redeem a stolen horse, if they claim him within 6 months after the selling at the parish or corporation where he shall find him, and make proof by two sufficient witnesses, before the next justices of peace in the county, or before the head-officer of a corporation, that the horse was his, and re-pay to the buyer such price for the horse as the same buyer shall upon his own oath before such justice or officer testify to have paid for him.

(I. 5) Who may go to Fairs or Markets to sell there.

1. 3 H. 7. 9. UPON an ordinance made by the city of London to prohibit citizens to carry their wares to fairs and markets out of the city, this act gives them liberty, and makes that ordinance void; and none shall trouble any citizen for so doing in pain of 40l. to be divided betwixt the King and the prosecutor.

2. 1 & 2 Ph. & M. 7. enacts, That none dwelling in the country out of a corporation or market-town shall sell or cause to be sold by retail any woollen cloth, linnen cloth, haberdasher wares, mercery wares, in any such corporation or market town, or the suburbs or liberties thereof, (except in open fairs) in pain to forfeit for every time so offending 6s. 8d. and the whole wares so sold, or offered to be sold; the one moiety of which forfeiture shall be to the King and Queen, and the other to the seisor or prosecutor.

3. Stat. 18 Eliz. cap. 21. enacts, That it shall be lawful for all persons to buy and sell within the borough of New Woodstock all manner of wools and yarns upon the usual markets and fair days, and the same to use to their best advantage.

(K) Pleadings of Goods bought in Market-overt.

1. WHERE the buyer justifies the buying of a horse in market-overt to change the property, he shall shew of whom he bought. Br. Count. pl. 78. cites 9 H. 6. 45.

2. In trespass of goods taken the defendant said, that the city of London is an ancient city, in which there has been a market time out of mind, every day in the week for all men to sell, and that A. was possessed of the goods, and sold them at London before the trespass for

* Br. Pleadings, pl. 127. cites S. C.—In trover, the defendant,

101. *by which he took them &c.* The plaintiff demurred, because he did *not say whose the market was*, nor did he except the the Lord's day, on which market cannot be by the law of God, nor is it *shewn what toll was paid*, and yet the Court held against the plaintiff, by which he was nonsuited; for a *market goes with the land, and therefore need not shew who is owner*, and herewith agrees *liber intrationum*. And see that property may be altered there without paying toll; for this is a *duty to the lord of the market, and not a property*. Br. Trespals, pl. 328. cites 12 E. 4. 8. 9.

as to part, pleaded that the city of London is an ancient city, and that [252] within the same is a market every day for all goods to be sold in every part of the

city in every open shop every day besides Sundays and Holidays betwixt sun-rising and sun-setting, so as one of the contractors be a freeman; and that he being a freeman of the company of mercers such a day, not being Sunday or Holiday, bought those things of one H. C. for such a sum in his open shop, wherein he had a long time used to buy such wares, and so justifies the conversion; and upon this plea the plaintiff demurred: and upon the first motion at the bar all the Court conceived that the plea was not good; for the custom is too general, that every freeman might buy all manner of wares in every shop &c. for then a scrivener might buy plate in his shop, and the like &c. which is not reasonable. And here he being of the mystery of mercers, to buy petticoats and cloaks &c. it is not agreeable to his trade. And Popham said, that it had been resolved, that such custom being found by a special verdict was unreasonable; wherefore it was adjudged for the plaintiff. Cro. J. 68, 69, Pasch. 3 Jac. B. R. Taylor v. Chambers.

3. Where defendant pleads, that he bought the goods in a market-overt, he ought to shew *on what day the market was kept*, and that it was not kept at a time when by the patent it ought to be kept. Sti. 113. Trin. 24 Car. Marshall v. Porter.

4. Trover for goods, to which it was pleaded by defendant that he had bought them in market-overt. You must *prove the sale in market-overt, and at a convenient time*. 12 Mod. 209. Mich. 11 W. 3. Burch v. Scory.

(L) Equity.

1. **I**F a trespassor of goods sells them in market-overt, the owner's title is barr'd; but *if they come to the trespassor again*, he may seize them; per Finch C. 2 Chan. Cases 126. Mich. 34 Car. 2. in Case of Bovey v. Smith and Boney.

Vern. 84. S. C. and P.

Marriage.

A) Marriage. *Contract of Marriage, what is, and how dissolved.*

1. **A** Marriage was had between two *infra annos nobiles* pursuant to a covenant between the several parents. At 14 years the husband disagreed. It was argued by Egerton, the Queen's solicitor, that this marriage, so far as it concerns the covenant, is to be considered according to the reason of the common law, and not according to the rules and grounds of the canon or civil law, not as a marriage in right, but as a marriage in possession, and marriage in possession is sufficient always in personal things and causes, especially where the possession of the wife is in question; but where the possession of the husband is in question, there marriage in right ought to be. Le. 53. Pasch. 29 Eliz. in Case of Leigh v. Hanmer.

2. Contract *per verba de futuro* is releasable. But *per verba de presenti* is not; per Holt Ch. J. 2 Salk. 437. Pasch. 2 Ann. B. R. Jesson v. Collins.

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(B) Contract of Marriage *sentenced and how.*

1. **S**ententia contra matrimonium nunquam transit in rem judicatam. 7 Rep. 42. b. (43. b.) Kenn's Case.

Sid. 13. accordingly; but Twissden contra.

2. If F. be divorc'd from her baron causa *præcontractus* made with another *per verba de presenti*; immediately by the sentence given in the Court, the marriage shall be *consummated* between the said F. and first baron *without any rites* to be in facie ecclesiæ. Otherwise on contract *per verba de futuro*. D. 105. b. 17. marg. per Noy attorney general in his Lent Reading. 1632.

(C) Actions relating to Contracts.

See 3 Lev. 65. PHILPOTT v. WALLEY, where it is reported to have been resolved that

such pro-

mise is directly within the words of this statute, and not out of the intent; because it was in consideration, the one would marry him, the other would marry her; and so it is a promise in consideration

1. 29 Car. 2. cap. 3. §. 4. **N**O action shall be brought to charge any person upon any agreement made upon consideration of marriage unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party so to be charged therewith, or some other person by him authorized.

Operation of marriage.—Skin. 54. S. C. PHILPOT v. WALCOTT in C. B. and held per Windham, Levins and Charleton to be within the statute, and that it might be demurred to; but North Ch. J. being absent, adjournatur.

In action sur case upon mutual promises of marriage the counsel for defendant offered that it was within this statute; but ruled e contra, per Jeffries Ch. J. Skin. 196. pl. 10. Anon.

2. *Assumpsit* &c. for that in consideration he had promised to marry the defendant, she had promised to marry the plaintiff; after a verdict for the plaintiff it was moved in arrest of judgment, that this action could not be brought *by the man*, because marriage is no advantage to him, but to the woman, but non allocatur; for marriage is a consideration on the man's side sufficient to raise an use, and Holt Ch. J. said this action is *grounded on mutual promises*; for if the woman's promise should not bind her, then it is but nudum pactum on the man's side, and therefore it is actionable either on both sides, or on neither side. 1 Salk. 24. Mich. 10 W. 3. B. R. Harrison v. Cage.

In this case the plaintiff averred that he offered to marry her but she refused which in this case was necessary to entitle the plaintiff, no certain time having been agreed on

for marriage. Carth. 467. Harrison v. Cage.—S. C. 12 Mod. 214.—S. P. Sid. 180. Hebdon v. Butler.—1 Lev. 147. S. C.

3. A prohibition was moved for to stay a suit in the Spiritual Court upon a contract of marriage *per verba de presenti* suggesting, that in effect the contract was *per verba de futuro*, for which, if not performed, the party had remedy at common law; Holt Ch. J. said, that tho' it was *per verba de presenti*, yet it was a matrimonial matter, and the Spiritual Court had jurisdiction, and this was the great objection against actions at law when first brought up in these cases. But in answer to this it was held, that the remedy in the Spiritual Court was waved by betaking himself to damages for the breach; and he said, that where it is *per verba de futuro*, which do not intimate an actual marriage, it is releasable, and as it is so, the party may admit the breach and demand satisfaction; a prohibition was denied. 2 Salk. 437. Pasch. 2 Annæ B. R. Jessen v. Collins.

4. If a man of full age and a female of 15 promise to intermarry, and afterwards he marries another, an action lies against him; for tho' such marriage may be said to be voidable as to the infant, yet it shall be binding on the person of full age, who shall be presumed to have acted with sufficient caution; otherwise this privilege allowed infants of rescinding and breaking thro' their contracts, which was intended as an advantage to them, might turn greatly to their prejudice. 3 New. Abr. 574. cites Trin. 5 Geo. 2. Holt v. Ward.

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(C. 2) Actions on Contracts, Pleadings and Evidence.

See Trial (B. f. 6)

1. *Assumpsit*, in consideration that the plaintiff promised to marry, the defendant promised to marry him; it was *proved* upon evidence that there was a promise; but the defendant *pro-*

produced a sentence in the Spiritual Court disaffirming the contract, and this was held good counter-evidence, and the plaintiff was nonsuit; cited per Holt Ch. J. as a Case which he remembered. 2 Salk. 438. in Case of Jeffon v. Collins.

2. If a man makes a promise to marry a woman, and was incapable to perform it *by reason of consanguinity &c.* it would be there a void promise, whereof she might discharge herself by giving the *special matter in evidence* on non assumpsit. 12 Mod. 214. Harrison v. Cage & Ux.

(D) *What is, or amounts to Marriage; and what shall be said Evidence.*

1. **B**ARON being about the *age of 11 years*, and the woman of 16 years, they contract matrimony and after they procure it legitime solemnizari between them, and after the baron dies before the age of 12 years; per Cur. this is a lawful marriage. Dal. 79. pl. 16. 14 Eliz.

2. Matrimony is not *till after years of consent*, but *sponsalia* may be before. Arg. Mo. 742. Mich. 41 & 42 Eliz. Sir Arthur George's Case.

3. If *idiot* contracts matrimony it is good, and shall bind him. Sid. 112. Pasch. 15 Car. 2. in Cam. Scacc. by 3 J. in Case of MANBY v. SCOTT cites it as adjudged 3 Jac. in Case of Stiles v. West.

4. 12 Car. 2. cap. 33. *All marriages solemnized in any the King's dominions since the 1st of May 1642. before any justice of peace, or so reputed, or according to any ordinance, or reputed ordinance of both, or either houses of parliament, or of any convention sitting at Westminster under the name of a parliament shall be of effect as if solemnized according to the rites used in the church of England; and issue upon bastardy, or unlawfulness of marriage, concerning such marriages, shall be tried by jury. Confirmed 13 Car. 2. cap. 11.*

2 Show.
300. Weld
v. Cham-

5. Contract *per verba de presenti* amounts to actual marriage, which the parties themselves cannot dissolve. 6 Mod. 155. — As where the words are, viz. *I marry you, or you and I are man and wife*; and this is not releasable; but if *per verba de futuro*, as *I will marry you, I promise to marry you &c.* this is releasable. 2 Salk. 437. Pasch. 2 Annæ. B. R. Jeffon v. Collins. — The wife sued in the Spiritual Court for alimony; the case was that the husband was an *anabaptist*, and had a licence from the bishop to marry but married the woman according to the forms of their own religion; and Holt said that by the canon law a contract *per verba de presenti* is a marriage; and that so it is of a contract *per verba de futuro*, if the contract be executed and he does take her, it is a marriage, and they cannot punish for fornication. 2 Salk. 438. Mich. 5 Annæ. B. R. Wigmore's Case.

6. *Entry of names* of persons as married in a church-book is not positive evidence of the marriage unless the *identity of persons* be proved, or that it be strengthened with proof of *cobabitation*, or allowance of parties. MS. Tab. tit. Marriage cites 28. Jan. 1718. Draycot v. Tabbot.

(D. 2) Good. In regard of the Person marrying generally without Consent or Licence.

1. 2 & 3 E. 6. 21. *ALL laws, canons, constitutions, and ordinances, which prohibit marriage to spiritual persons, who by God's law may marry, and all pains and forfeitures therein contained, shall be void.*

Provided, that this act shall not give liberty to marry without asking in the church, and other ceremonies appointed by the Book of Common-Prayer.

Decrees and divorces heretofore made, are saved.

2. 5 & 6 E. 6. 12. *The marriage of priests and other spiritual persons shall be lawful, and their children legitimate and inheritable; likewise they to be tenants by the curtesie, and their wives dowable.*

3. *The 100 canon is that no children under the age of 21 years compleat shall contract themselves, or marry without the consent of their parents, or of their guardians and governors, if their parents be deceased.*

(E) Good. In regard of the Person with whom Degrees prohibited.

1. 32 Hen. 8. cap. 38. s. 2. *ALL such marriages as within the Church of England shall be contracted between lawful persons (as all persons be lawful that be not prohibited by God's law to marry) being contract and solemnized in the face of the church, and consummate with bodily knowledge and fruit of children, shall be lawful and indissoluble, notwithstanding any dispensation, prescription, or other thing. And * no reservation or prohibition (God's law except) shall impeach any marriage without the Levitical degrees. And no person shall be admitted in Spiritual Courts to any process contrary to this act.*

So much of this act as is not repealed by 2 & 3 Ed. 6. cap. 23 is revived by 1 Eliz. cap. 1.— The clear sense of this clause must be, that all marriages are lawful which*

are not prohibited within the Levitical degrees, or otherwise by God's law. So as the prohibiting of marriages within the Levitical degrees, and within God's law, whereof the Levitical degrees are a part, is no more or less in effect than to say, that all marriages shall be lawful which God's law does not prohibit. Per Vaughan Ch. J. Vaugh. 219: in Case of Harrison v. Burwell.

2. 2 & 3 Edw. 6. cap. 23. s. 7. *As concerning pre-contracts the statute 32 Hen. 8. cap. 38. shall be repealed, and reduced to the state of the King's ecclesiastical laws.*

3. *A man married the relict of his great uncle, viz. his grandfather's brother by the mother's side, and the question was, whether this was a lawful marriage by the act of 32 H. 8. 38. And Vaughan Ch. J. who delivered the opinion of all the judges of England, held, that the marriage was lawful by that statute; and*

2 Vent. 9. to 22. Trin. 22 Car. 2. C. B. S. C. that the prohibition do stand, and

no consultation be granted.

accordingly judgment was given, that a prohibition should go to the Spiritual Court. Vaugh. 206 to 250. Trin. 20 Car. 2. C. B. Harrison v. Burwell.

4. It was moved for a prohibition to the Spiritual Court, and the suggestion was, that they proceeded there to excommunicate the plaintiffs, for that the plaintiff Heyward had married the other plaintiff, who was the *daughter of the sister of his first wife*, and it was granted; and the defendant demurred on the suggestion, because it appears that the marriage was not lawful. Et adjournatur to be argued. Sid. 434. Heyward and Ux v. Foine.

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5. Prohibition to the dean of the Arches suggesting that Collet had settled his lands on his children by his wife now living, and that the suit in the Arches was for a divorce, he having married his *first wife's sister*, the consequence whereof would be, to make his children bastards, and draw the settlement of his lands in question; but at first the prohibition was denied, because if it should be granted, then every incestuous marriage might be sheltered under the like pretence; and the matter being proper to the jurisdiction of the Spiritual Court shall be tried there, tho' a temporal inheritance may in consequence come in question: but it appearing afterwards to the Court, that this divorce was prosecuted by contrivance, that Collett might have power to dispose his estate (for at the first instance, he confessed his former marriage with his wife's sister, upon which confession the Court was ready to give sentence, without any farther evidence). The Court ordered a trial at common law in a feigned action, in which the issue should be, whether Collett was ever married to his wife's sister, which being refused, a prohibition was granted. Nels. Abr. 1158, 1159. Marriage (A) pl. 18. cites T. Jones, 213. Collett's Case.

6. On a motion for a prohibition to the Court of the bishop of Exon, for prosecuting J. S. for incest in marrying the *daughter of his brother of the half blood* it was resolved that no prohibition should go; for the Court said, that tho' the brothers were not of the whole blood, yet were they brothers, and therefore the marriage incestuous. 3 New. Abr. 573. cites Mich. 30 Car. 2. C. B. Oxenham and Ux v. Gayre.

7. If the *father marries the mother, and the son marries the daughter*, this is lawful enough. 3 New. Abr. 573. cites it as agreed by the Court. Mich. 30 Car. 2. in the Case of Oxenham v. Gayre.

8. One married *his great aunt's husband's second wife*; this was held by divines and civilians a good marriage; for *affinis mei affinis non est mihi affinis*. 3 New. Abr. 573. mentions it as cited by North Ch. J. in the Case of Oxenham and Ux v. Gayre as the Earl of Manchester's Case.

2 Jo. 218. says, it was for marrying his

9. Prohibition was prayed to the Court of York to stay a suit to dissolve a marriage with his *first wife's daughter*, because not within the Levitical degrees; and a prohibition was granted nisi &c.

&c. It was adjourned; but the reporter says, he afterwards heard that a consultation was granted. 2 Lev. 254. Trin. 31 Car. 2. B. R. Wortley v. Watkinson.

wife's sister's daughter.—The Case of WATKIN-

SON v. MERBATHON seems to be the S. C. though it was Pasch. 34 Car. 2. B. R. whereas this is Trin. 31 Car. 2. B. R. But there it is for marrying *his sister's daughter*, and that the defendant prayed a prohibition, because out of the Levitical degrees; but denied by the whole Court; because it is a matter of ecclesiastical consueance, and divines know better how to expound the law of marriages than the common lawyers; and though sometimes prohibitions have been granted in causes matrimonial, yet if it were now res integra they would not be granted. Raym. 464.—Where a suit was for marrying *his first wife's sister*, a prohibition was granted, to the intent to have a declaration thereupon, so that the lawfulness of the marriage might come in debate. 3 Lev. 364. 5 W. & M. B. R. Honour v. Bradshaw.—But where a suit was against the plaintiff in the Ecclesiastical Court for incest in marrying his first wife's sister a prohibition was moved for, *suggesting that the said second wife was dead, and that by her he had a son, to whom an estate was descended, as heir to his mother*, and that notwithstanding he had pleaded this matter, they went on to annul the marriage, and bastardize the issue. And per Cur a prohibition shall go as to annulling the marriage, or bastardizing the issue, but they may proceed to punish the incest. 2 Salk. 548. Hill. 4 & 5 W. & M. B. R. Harris v. Hicks.—Upon the question, whether the husband *marrying the wife's sister after the wife's death* be such a marriage as by the statute of 32 H. 8. the Temporal Courts may prohibit the impeaching, or drawing it into question in the Spiritual Court in order to a divorce or separation of the parties, Ld. Ch. J. Vaughan conceived that they could not. 1. Because this marriage is expressly prohibited by the 18th of Leviticus, and then it must be within the Levitical degrees. 2. If it were not so prohibited, yet it is not a marriage without the Levitical degrees, but within them, and therefore no prohibition will lie for impeaching it; for marriages not to be impeached must be without the degrees, and for that some marriages within the degrees may be lawful. 3. That if this marriage be without the Levitical degrees, yet it is a marriage prohibited by God's law, and therefore to be impeached, notwithstanding the statute of 32 H. 8. whose words are, that *no marriage (God's law excepted) shall be impeached without the Levitical degrees*. Per Vaughan Ch. J. in delivering the opinion of the Court. Vaugh. 305. Trin. 25 Car. 2. C. B. Hill. v. Good.

10. Tho' the *nephew cannot marry the aunt*, because she is superior to her husband in point of parentage, and therefore the marriage incongruous; yet the *uncle may marry the niece*; because where the uncle marries the niece, he is superior to her both in point of parentage and of matrimonial government. Cited per Twifden J. 2 Lev. 254. in Case of Wortly v. Watkinson, as resolved in Allington's Case. [257]

11. Prohibition to the Ecclesiastical Court against a man for marrying his *sister's bastard daughter*; the reasons offered were, that it is not within any of the Levitical degrees, and that such only are under the cognizance of the Spiritual Court; it is true, that law forbids a man to approach to any near of kin to uncover her nakedness, but that can never be intended of a bastard, because she is of kin to no person whatsoever, and is quasi nullius filia. But to this it was said on the other side, that at the time when the Levitical law was established, there was no difference amongst the Israelites between a child born in adultery, and in lawful marriage; and therefore a bastard was proximus sanguinis amongst them, and that they were the best expositors of that law; that it is morally as unlawful to marry a bastard, as one born in wedlock; and it is so also in nature; for the Levitical law was grounded upon a natural as well as on a politick reason to enlarge their kindred, and unite their families; therefore if a bastard does not fall under the prohibition that a man ad proximum

A prohibition was denied. Comb. 356. Hill. 8 W. 3. S. C.

mum sanguinis non accedat, a mother may marry her bastard son; the Court inclined not to grant the prohibition Sed adjournatur. 5 Mod. 168. Hill. 7 W. 3. Haines v. Jescott.

S. P. And a prohibition was awarded because such marriage is not prohibited by the Levitical law. Mo. 907. Pasch. 33 Eliz. pl. 1266.—Mann's Case.—Cro. E. 228. pl. 16. S. C. that though this was not prohibited within the Levitical degrees, yet

12. Libel &c. against the defendant, for marrying and cohabiting with his *wife's sister's daughter*; it was suggested for a prohibition, that this is not within the Levitical degrees; for a man may marry his niece, tho' he cannot marry his aunt, because of the *superiority which she has over him*. But Holt Ch. J. asked, what superiority is there by an aunt over her nephew? and asked what ground there was for the distinction, and said he could not see any difference between the two cases; and that this case was within the degrees of affinity, and in the same degree of consanguinity there would have been no doubt of it; for a man cannot marry his own sister's daughter; and said, that he thought this case had been settled, and that there was a case in point against them: but indeed, if this marriage be not within the Levitical degrees, the Spiritual Court is to be hindered from proceeding on a wrong foundation. 5 Mod. 448. Mich. 11 W. 3. Clement v. Beard.

because *degrees more remote are forbidden*, they gave sentence of divorce; and he grounded his prohibition upon the statute of 32 H. 8. cap. 38. and a consultation was prayed and granted, because the prohibition is not to be, if it be not within the Levitical degrees; and here it was general, and therefore not good.—4 Le. 16. S. C. reported according to Cro. E. 228.—Id. Ch. J. Vaughan takes notice, that Co. Litt. 237. a. construes the statute of 32 H. 8. 38. which declares, that all persons may lawfully marry, who are not prohibited by God's law to marry, to be the same as to say, that be not prohibited by the Levitical degrees; by which he says, that *Ld. Coke evidently makes all the law of God, which prohibits marriages to be the Levitical degrees only*. Whereas Vaughan says, he conceives clearly, that *there are other laws of God prohibiting marriages*; and if made, warranting their dissolution; and so intended to be by this statute of 32 H. 8. besides the law of God in the Levitical degrees. As 1. *persons precontracted* to another are prohibited by God's laws to marry against such pre-contract. 2. *Persons of natural impotency* for generation are prohibited to marry. 3. *Plurality of wives or husbands* is prohibited by God's law, the first not being prohibited by the Levitical degrees; and says, that Coke, in the end of his comment upon this statute, notwithstanding the passage before in his Littleton, saith expressly, that marriages with a person pre-contracted or impotent could not have been questioned in order to a divorce, by reason of this statute, but because such marriages are against God's law; yet they are all without the Levitical degrees. This is the reason of (*God's law except*) for these marriages may be impeached, though out of the Levitical degrees; and this answers the words (*or otherwise by holy scripture*) in 28 Ez. 8. cap. 16. also. Vaugh. 220, 221. in Case of Harrison v. Burwell.

13. The 99th canon is, that no persons shall marry within the degrees prohibited by the laws of God, and *expressed in a table set forth by authority in the year of our Lord God 1563*. And all marriages so made and contracted shall be adjudged incestuous and unlawful, and consequently shall be dissolved as void from the beginning, and the parties so married shall by course of law be separated. And the aforesaid table shall be in every church publickly set up and fixed at the charge of the parish. Constitutions and Canons in 1603.

(E. 2) Good. In regard of the *Licence* and *Registering*, *Banns*, and *Place where*; and Punishment of marrying otherwise, what, and in what Cases.

1. *NO minister, upon pain of suspension per triennium ipso facto, shall celebrate matrimony between any persons without a faculty or licence granted by some of the persons in these our constitutions expressed, except the banns of matrimony have been first published three several Sundays or Holydays in the time of divine service in the parish churches and chapels where the said parties dwell, according to the Book of Common Prayer; neither shall any minister, upon the like pain, under any pretence whatsoever, join any persons so licenced, in marriage at any unreasonable times, but only between the hours of eight and twelve in the forenoon, nor in any private place, but either in the said churches or chapels where one of them dwelleth, and likewise in time of divine service, nor when banns are thrice asked (and no licence in that respect necessary) before the parents or governors of the parties to be married, being under the age of twenty one, shall either personally, or by sufficient testimony, signify to him their consents given to the said marriage. The 62d. Canon. Constitutions and Canons in 1603.*

Godolph. Rep. 466. cap. 33. s. 3. —So that the express words of this canon require, that no clergyman shall marry any persons but in the parish church where one of those persons dwells. Per Ld. C. Hardwick. Barn. Chan. Rep. 408. Hill. 1741. cites this canon, in the Case of

Moor v. Moor.—By the provincial constitutions that banns ought to be solemn publications, that is, they ought to be thrice published in the parochial churches where the contracting parties and their parents dwell, on three Sabbath days, or three Festival days, (allowing some interval of time between each) at the time of divine service, when most of the parishioners are assembled together, by the parsons of the said parishes respectively, or others in holy orders. at such times and seasons where solemnization of marriage is not canonically prohibited, *Glos. verb. Bannorum.* Yet where three festivals immediately succeed each other, such publication in them made, holds good in law. *Prov. Const. de Spons. Glos. in Verb. a se distantibus;* as also shall the marriage itself, when once solemnized, albeit such publication of banns, as aforesaid, did not precede the same. *Gl. in v. Solen. Edit. de cland' despon'* Godolph. Rep. chap. 23. s. 2. and cites the books before-mentioned.

2. The 63d canon is, That every *minister* who shall hereafter *celebrate* marriage betwixt any persons *contrary* to our said *constitutions*, or any part of them, under colour of any peculiar liberty or privilege claimed to appertain to certain churches or chapels, *shall be suspended per triennium* by the ordinary of the place where the offence shall be committed. And if any such minister shall afterwards remove from the place where he hath committed that fault before he be suspended as is aforesaid, then shall the bishop of the diocese, or ordinary of the place, where he remaineth, upon certificate under the hand and seal of the other ordinary from whose jurisdiction he removed, execute that censure upon him. Constitutions and Canons in 1603.

3. The 101st canon is, That *no* faculty or *licence* shall be henceforth granted for solemnization of matrimony betwixt any

parties

parties *without thrice open publication of the banns* according to the Book of Common-Prayer by any person exercising any ecclesiastical jurisdiction, or claiming any privilege in the right of their churches; but the same shall be granted only by such as have episcopal authority, or the commissary for faculties, vicars general of the archbishops, and bishops *sede plena*, or *sede vacante*, the guardian of the spiritualties or ordinaries exercising of right episcopal jurisdiction in their several jurisdictions respectively, and unto such persons only as be of good state and quality, and that upon good caution and security taken. Constitutions and Canons in 1603.

This canon likewise requires the same thing with the [259] former, that the marriage should be in the parish church which one of the parties belong to, per Lord C. Hardwick Barn. Chan. Rep. 409. Hill. 1741. Moor v. Moor.

4. The 102d canon is in these words; The *security* mentioned shall contain these conditions, 1st. That at the time of the granting every such licence there is not any impediment of pre-contract, consanguinity, affinity, or other lawful cause to hinder the said marriage. 2dly. That there is not any controversy or suit depending in any court before any ecclesiastical judge touching any contract or marriage of either of the said parties with any other. 3dly. That they have obtained thereunto the express consent of their parents (if they be living), or otherwise of their guardians or governors. Lastly, That they shall celebrate the said matrimony publickly in the parish church or chapel where one of them dwelleth, and in no other place, and that between the hours of 8 and 12 in the forenoon. Constitutions and Canons in 1603.

Cited by Ld. C. Hardwicke but said, that according to the practice of making out licences nothing of this is observed. That it is strange to consider that the Ecclesiastical Courts should get into a practice so diametrically opposite to the express words of the canons. That one would think this practice of making out licences contrary to the canons, proceeded from a notion that a metropolitan might dispense with the canons. It is true the King may, but the metropolitan cannot; for which reason when dispensations of this sort have been made by the metropolitan, they have always been confirmed by the Crown. Barn. Chan. Rep. 410. in Case of Moor v. Moor.

5. The 103d canon is in these words; For the avoiding of all fraud and collusion in the obtaining of such licences and dispensations, we further constitute and appoint, that *before any licence* for the celebration of matrimony, without publication of banns, *be had or granted, it shall appear to the judge by the oath of two sufficient witnesses*, one of them to be known either to the judge himself, or to some other person of good reputation then present, and known likewise to the said judge, *that the express consent of the parents, or parent, if one be dead, or guardians or guardian of the parties, is thereunto had and obtained; and furthermore, that one of the parties personally swear, that he believeth there is no let or impediment* of pre-contract, kindred or alliance, or of any other lawful cause whatsoever, nor any suit commenced in any Ecclesiastical Court, to bar or hinder the proceeding of the said matrimony, according to the tenor of the aforesaid licence. Constitutions and Canons in 1603.

6. The 104th canon is, That if both the *parties* which are to marry, being *in widowhood*, do seek a faculty for the forbearing of

of banns, then the clauses before mentioned requiring the parents consents may be omitted; but the parishes where they dwell both shall be expressed in the licence, as also the parish named where the marriage shall be celebrated. And if any commissary for faculties, vicars-general, or other the said ordinaries shall offend in the premises, or any part thereof, he shall for every time so offending be suspended from the execution of his office for the space of six months; and every such licence or dispensation shall be held void to all effects and purposes, as if there had never been any such granted; and the parties marrying by virtue thereof shall be subject to the punishments which are appointed for clandestine marriages. Constitutions and Canons in 1603.

7. 6 & 7 W. 3. cap. 6. s. 52. enacts, That no person shall be married at any place pretending to be exempt from the visitation of the bishop without a licence, except the banns be published and certified, and every parson, vicar, and curate, who shall marry any persons contrary to the meaning hereof, shall forfeit 100 l. to be recovered in any of Majesty's Courts of Record, one moiety to the King, and the other moiety to the informer, and shall for the second offence be suspended ab officio, & beneficio for three years.

8. 7 & 8 W. 3. cap. 35. s. 2. Every parson, vicar, or curate, who shall marry any persons in any church or chapel exempt or not exempt, or in any other place whatever, without publication of the banns of matrimony between the respective persons according to law, or without licence for the said marriages first had and obtained, shall for every such offence forfeit the sum of 100 l.

S. 3. Every parson, vicar, or curate, who shall substitute, or knowingly permit any other minister to marry any persons in any church or chapel to such parson &c. belonging, without publication of banns or licences, shall forfeit 100 l. to be recovered in any of his Majesty's Courts of Record; one moiety to his Majesty, and the other moiety to him who shall sue for the same.

S. 4. Every man married without licence or publication of banns shall forfeit 10 l. to be recovered with costs as aforesaid by any person who shall sue for the same; and every sexton or parish clerk who shall knowingly assist at such marriages shall forfeit 5 l. to be recovered with costs as aforesaid by any person who shall sue. [260]

3. 10 Ann. cap. 19. s. 176. Every parson, vicar, or curate, or other person in holy orders, who shall marry any person without publication of banns, or without licence from the proper ordinary, shall forfeit 100 l. to be recovered with costs in any of her Majesty's Courts of Record at Westminster; one moiety to the Queen, and the other moiety to him who shall sue for the same; and if such offender be a prisoner in any prison (other than a county gaol) and shall be convicted of such offence by action or information, upon oath made of such imprisonment, before any judge of her Majesty's Courts of Record at Westminster, and upon producing a copy of the record of such conviction proved upon oath, the judge is required to grant his warrant to the keeper of the gaol where such offender is a prisoner, to remove such offender to the gaol of the county; or if any gaoler shall knowingly permit

permit any marriage to be solemnized in his prison before publication of banns, or licence obtained, he shall forfeit 100l. as aforesaid.

S. 177. *Saving to all archbishops, bishops, and other ordinaries &c. all ecclesiastical jurisdiction.*

S. 178. *The said provision for marriages shall not extend to Scotland.*

(F) Good. *Performed how; and by whom.*

1. *Solemnization of marriage* was not used in the church before an ordinance of Pope Innocent III. before which the man came to the house where the woman inhabited, and carried her with him to his house, and this was all the ceremony. Mo. 170. by Goldingham Doctor of the Civil Law, Pasch. 23 Eliz. Bunting's Case.

2. A prohibition was prayed to the Ecclesiastical Court upon suggesting the statute 1 W. & M. by which it is enacted, that *all marriages between dissenters (taking the oaths of allegiance and supremacy, and subscribing the declaration mentioned in the statute 30 Car. 2.) solemnized before witnesses in the face of their congregation, and licensed according to that statute, shall be good and valid in law, and that no person should be presented in the Ecclesiastical Court for nonconformity to the Church of England in such marriages; and that the interpretation of all statutes belong to the common law; that the plaintiffs, being dissenters, had taken the said oaths, &c. and were married in the face of their congregation, in the presence of witnesses, according to the statute, and after banns published according to the discipline of the said congregation, yet that the defendant had libelled against them in the Ecclesiastical Court for incontinence and fornication, and compelled them to answer there, where they had pleaded all this matter, which the Court there refused to admit; it was in another term agreed that a prohibition should go, and that the plaintiff should declare upon it, so that the law might be tried upon a demurrer.* 3 Lev. 376. Mich. 5 W. & M. B. R. Hutchinson and Ux. v. Brookbanke.

The wife sued in the Spiritual Court for alimony. In fact the husband was an anabaptist, and had a licence from the bishop to marry, but

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married her in the anabaptistical

3. A. had 3 daughters, B. C. and D.—B. married to F.—C. married to G. and D. married to one H.—This D. left 180l. in the hands of F. and took his bond payable to G. but for her use, and died; afterwards H. her husband administered, and F. and his wife sued to repeal it suggesting, that D. and H. were never married, for they were *sabbatarians*, and *married by one of their own ministers in a sabbatarian congregation*, and that they used the form of the Common Prayer except the ring, and the *minister was a layman and not in orders*; they lived together as man and wife as long as she lived, which was 7 years. This administration was repealed, and a new administration granted to B. which was affirmed upon an appeal to the delegates; for since the husband demanded a right due to him by the eccle-

fiastical law as husband, he must prove himself a husband according to that law to entitle him; and *tho' the wife*, who is the weaker sex, *and the children of this marriage*, who are in no fault, *may entitle themselves to a temporal right by such marriage*; yet *the husband*, who is actually in fault, *shall never entitle himself by the mere reputation of a marriage without right*. It was urged that this marriage is not a meer nullity, because by the law of nature the contract is sufficient; and tho' the positive law of man ordains marriage to be made by a priest, yet that makes this marriage irregular only, but not void, unless the positive law of man had gone on and expressly ordained it to be so; and a case was cited out of Swinborne, where such marriage was ruled void; and that an act of parliament was made to confirm the marriages contracted during the usurpation, and the constant form of *pleading* marriage is, *per presbiterum sacris ordinibus constitutum*. 1 Salk. 119. 9 Annæ. Coram Delegatis. Haydon v. Gould.

way. Upon a prohibition to the Spiritual Court of Peterborough. 2 Salk. 438. Wigmore's Case.—Such marriages give no title to the privileges of marriage legally solemnized. R. S. L. vol. 4. 199. Heydon's Case.

5. The giving a person away is not a thing essential to a marriage, but it is a custom that is usually practised. Barn. Rep. of Cases in Chan. 407. Hill. 1741. in Case of Moor v. Moor.

(F. 2) Marriage *de Facto*. Of what Force in Law as to others.

1. UPON a marriage *de jure* if the husband be murdered before disagreement the wife shall have an appeal of murder and a writ of dower. Arg. Le. 53. cites 39 E. 3

See Baron and Feme (F. 2)—Trespass (L. 2) So where appeal is brought of the rape of his wife al-

tho' she be his wife but in possession, and not in right. Arg. Le. 53, in Case of Leigh v. Hanmer. —cites 11 H. 4. 13. by Hulls 168.

2. If the wife be but of the age of 9 years she shall have her dower. Le. 53, 54. cites 35 H. 6. per Littleton.—And yet dower shall never accrue, but in case of marriage in right; for there, never accoupled in marriage, is a good plea. Ibid. cites 12 R. 2. Dower 54.

3. Marriage *de facto* is sufficient always in personal things and causes, especially where the possession of the wife is in question; but where the possession of the husband is in question, there marriage *de jure* ought to be. Arg. 1 Le. 53. Pasch. 29 Eliz. in Case of Leigh v. Hanmer.

4. In a *cui in vita* by B. and C. his wife the tenant pleaded never accoupled in loyal matrimony; the same is no answer to the wife; for she demands in her own right; and if he who aliened was her husband *de facto*, the wife could not have other action; for assise does not lie because he was her husband in fact at the said time in possession. Arg. 1 Le. 53. in Case of Leigh v. Hanmer.

5. A woman was libelled against in the Spiritual Court *causa jactitationis*

jaſtitationis maritagli; ſhe ſuggeſted for a prohibition, that this perſon was indicted for marrying her contra formam ſtatuti, *be having another wife then living, and that he was thereupon convicted, and had judgment to be burned in the hand, ſo that being tried by a jury and a court which had juřiſdiction of the cauſe, and the marriage being found, ſhe prayed a prohibition; it was objected, that no Court but the Eccleſiaſtical Court can examine a marriage; and Dr. Hedges a civilian then in Court ſaid, that marriage or no marriage never came in queſtion in their Court upon a libel for jaſtitation, unleſs the party replies a* [262] *lawful marriage; and that the Spiritual Court ought not to be ſilenced by a proof of a marriage de facto in a Temporal Court; for all marriages ought to be de jure of which their Courts had the proper juřiſdiction; and by the opinion of 3 judges a prohibition was granted. 3 Mod. 164. Hill. 3 Jac, 2. B. R. Boyle v. Boyle,*

(G) *Dissolved for what Cause.*

† Divorces a vinculo matrimonii are these, *cauſa præcontractus, cauſa metus, cauſa impotentiae ſeu frigiditatis, cauſa affinitatis, cauſa conſanguinitatis &c.* and I read in an ancient record coram Rege Paſch. 30 E. 1. WILLIAM DE CHADWORTH'S Caſe, that he was divorced from his wife, for that he did carnally know her daughter before he married the mother; all which are cauſes of divorce preceeding the marriage. Co. Litt. 235. a.

† A menſa & thoro, as cauſa adulterii, which diſſolveth not the marriage a vinculo matrimonii; for it is ſubſequent to the marriage. Co. Litt. 235. a.

2. 32 H. 8. cap. 38. ſ. 2. *All ſuch marriages as are contracted between lawful perſons (and all are hereby declared to be lawful perſons who are not prohibited to marry by God's law) being ſolemnized in the face of the church and conſummed with bodily knowledge and fruit of children ſhall be lawful and indiſſoluble, notwithstanding any diſpenſation, preſcription, or other thing. And no reſervation, or prohibition, (God's law except) ſhall impeach any marriage without the Levitical degrees; and no perſon ſhall be admitted in the Spiritual Courts to any proceſs contrary to this act.*

3. 2 & 3 Ed. 6. 23. ſ. 2. *So much of the ſtatute of 32 H. 8. 38. as makes a marriage diſſoluble which is ſolemnized in the face of the church and conſummed with bodily knowledge and fruit of children, notwithstanding a pre-contract, is hereby repealed; and it is declared that where any contract of marriage is pretended, it ſhall be lawful for the eccleſiaſtical judge to hear and determine the ſaid cauſe, and to give ſentence for matrimony, or the ſolemnization thereof, or for co-habitation, and to inflict ſuch pain upon the diſobedient as he might have done before the ſaid ſtatute; but by ſect. 4. all other clauſes and things mentioned in the ſaid act of 32 H. 8. 38. are hereby confirmed.*

4. By 1 & 2 P. & M. cap. 8. ſ. 20. *The aboveſaid ſtatutes of 32 H. 8. 38. and 2 & 3 Ed. 6. 23. are repealed.*

5. 1 Elix.

5. 1 Eliz. 1. So much of 32 H. 8. 38. as was confirmed by the said statute of 2 Ed. 6. 23. is hereby revived.

6. 12 Car. 2. 33. All marriages solemnized in any the King's dominions since the 1st. of May 1642. before any justice of peace, or so reputed, or according to any ordinance, or reputed ordinance of both or either houses of parliament, or of any convention sitting at Westminster under the name of a parliament shall be of such effect as if solemnized according to the rules used in the Church of England; and issue upon bastardy, or unlawfulness of marriage concerning such marriages, shall be tried by jury.

7. 13 Car. 2. 11. The last mentioned act for confirming marriage solemnized by justices of peace is hereby confirmed.

8. The legality of a marriage shall never be agitated in equity, especially after sentence in the Spiritual Court, in a cause of jactitation of marriage, altho' the proceedings in the Spiritual Court were only feint and collusive. MS. Tab. tit. Marriage, cites 1 April 1725. Hatfield v. Hatfield,

(G. 2) Dissolved by Disagreement. What shall be [263] said to be, at what Time, and the Effect.

1. **I**N debt on a bond the defendant pleaded, that the wife had another husband now living; the plaintiff replied, that the wife *ad annos nubiles* disagreed to that marriage, and upon demurrer to the replication, the question was, whether the agreement or disagreement should be before *annos nubiles*, or what time the law appoints for it. But adjudged for the plaintiff, because she cohabited with her second husband always after age of consent. Moor 575. Trin. 41 Eliz. Warner and Ux v. Babington.

This Case was adjudged first in C. B. and affirmed in B. R. *ibid.*

(H) Of what the Marriage is a Countermand.

See Feoffment (P. 2).

1. **T**RESPASS of chasing in the warren was brought by J. and E. dutchess of N. his feme of chasing dum uxor sola fuit; the defendant said, that the dutchess, when she was sole, gave licence to the defendant to chase there, when he pleased, for him and his servants, by which he chased and killed 4 hares and carry'd them away; and a good plea, without shewing the deed of licence, and the plaintiff travers'd the licence. Quære, if licence does not expire by the inter-marriage? and if licence to hunt shall serve to kill and carry away? Nevertheless it seems clear by the manner of the pleading, that the licence expired by the intermarriage. Br. Trespas 161. cites 22 H. 6. 52.

2. If a sole woman deliver an escrow upon a certain condition &c. and before the performance takes husband, yet if the condition is afterwards performed, and the escrow delivered as the deed of the woman, she shall be bound thereby; but some think otherwise; for they say, that by the delivery of the escrow by the stranger,

as the deed of the woman, then it began first to take effect as her deed, and shall not have relation to the time of the first delivery made by the woman, when she was sole; insomuch that if the party, to whom the obligation is made, before the conditions performed and before the last delivery by the stranger as the deed of the woman releases all actions and demands unto the woman, and afterwards the bailee delivers the obligation to whom it was made as the deed of the woman, because the condition is performed; the obligee, notwithstanding this release, shall have an action of debt upon this obligation, which proves that the last delivery shall not have relation to the first delivery; and at the time of the last delivery, and at the time of the condition performed, the woman had a husband. And all obligations made by a married woman &c. are void against her; and also it seems to them, that this marrying the husband is a countermand in law. Perk. S. 140.

3. But notwithstanding these reasons, it seems that *she shall be bound by the obligation*; for at the time of the first bailment she was sole, so that all things done at that time were good and lawful. Perk. S. 141.

4. And if a *sole woman covenants with me by indenture, to pay me 10l. at Easter 1640, and before that day she takes husband*, and the coverture continues between them until the day on which the covenant should be performed is past, she shall *not therefore be discharged of the covenant*, because the marriage could not be celebrated without her assent. And he who is bound to do a thing, or to suffer a thing to be done, cannot discharge himself thereof by his own act only, unless in special cases. Perk. S. 141.

[264] 5. And the woman when *she was sole could not countermand the bailment*, as this case is; because the obligee is as it were party and privy to the bailment of the obligation; inasmuch as he is to do and perform certain conditions, which are annexed to the bailment, and also is to take advantage by the performance of them &c. Tamen quære, forasmuch as the obligee was not party to the bailment, but the same was made by the woman only: but the law had been clear with the obligee, if the bailment &c. had been made by the woman and the obligee jointly. Perk. S. 141.

If a woman gives a warrant of attorney, and then marries, you may file a bill and counter judgment

against both by the practice of the Court. Ruled upon motion. Show. 91. Hill. 1 W. & M. Nightingale v. Adams.

6. *Warrant of attorney was given to a feme sole to confess a judgment*, and afterwards she married. The Court gave leave, notwithstanding the marriage, to enter the judgment. For the authority being *to the husband's advantage* shall not be deem'd to be revok'd or countermanded. 1 Salk. 117. Hill. 1 Anne B. R. Anon.

7. So if a *reversion be granted to a feme sole*, and then she marries before attornment, yet the tenant may attorn afterwards. 1 Salk. 117. in the Case above.

(I) Brocage

(I) Brocage Bonds &c.

1. **A** *Bill* entered into to procure a marriage [was order'd to be] *cancelled*. Toth. 86. cites 10 Jac. Arundel v. Drew.

2. Bonds entered into for procuring a marriage *cancelled*. Toth. 89. cites Feb. 17. Jac. Arleston v. Kent.

3. Bond for having procured a marriage, according to a promise before the marriage, was decreed to be *cancelled*. 10 Car. 1. Chan. Rep. 87. Arundel v. Trevillian.

Cited Parl. Cases 76. in Case of Hall v. Potter. N. Ch. R. 129. S. C.

4. Marriage brocage bonds were severally *given both by the man and woman*; the man was a broken merchant and worth nothing, the woman was worth 1200*l.* The man's bond was decreed to be paid, but the wife's to be delivered up. 21 Car. 2. 3 Ch. R. 31. Glanvill v. Jennings.

5. *Guardian of a young woman* made up an account with one that courted, and after married her, and 800*l.* being found due the guardian gave bond for so much to the suitor, and took back a bond of 1400*l.* penalty conditioned to *release all accounts* to him after the marriage. Guardian paid the 800*l.* to the suitor after marriage, who brought his bill to be relieved against the bond of 1400*l.* and the bill being brought in a short time after marriage, Ld. Keeper (the pursuit being fresh) ordered the guardian to answer the bill. 2 Ch. Cases 157. Mich. 35 Car. 2. Osborne v. Chapman.

6. Marriage brocage bond was decreed *to be deliver'd up*, it being effected without consent of the young woman's parents who were living; and per Chancellor Jefferies, there is a material difference where parties are at their own disposal, and where their *parents are living*, tho' in no case they ought to be countenanced. Pasch. 2 Jac. 2. Vern. 412. Drury v. Hooke.

2 Chan. Cases 175. S. C. In this case the man who gave the bond was 60 years of age, but the woman young.

7. A. having a son of a good estate, contrives the marriage of him with the daughter of B. who paid no *fortune* to A. but paid 2000*l.* to the mother, which was intended probably as a consideration *to the mother* of A.—Decreed that the mother of A. should make good to A. as much of the 2000*l.* as she was able, and C. to whom the money was paid for A. to make good the residue. Vern. 451. Pasch. 1687. Tooke v. Sir R. Atkins & al.

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8. T. gave *bond* to P. to pay him 500*l.* within three months after he should be married to the Lady Ogle, a widow of great fortune and honour &c. Debt was brought against T's executors, and upon a trial before Ld. Ch. J. Holt, the plaintiff had a verdict. Afterwards a bill in Chancery was brought by the defendant suggesting that the contract was void, it being for procuring the said marriage, she being a person of so great honour and fortune; and that nothing was done by P. but advising T. to apply himself to one Brett, who had a great interest with

with the lady, and some small matter expended in entertaining T. and so not sufficient consideration for this bond; or if it was, yet such contracts for procuring a marriage are of dangerous consequence, and several precedents were produced, but in all those there appear'd some circumventions; but the defendant answered, that no such was used in this case; that here was nothing but advice; and that in this case the marriage was suitable in respect both of birth and fortune; and a case was cited between FOSTER and RAMSEY, tried before Holt Ch. J. where the defendant promised the plaintiff 50*l.* if he would procure Ramsey a widow to marry him, and the plaintiff recovered the 50*l.* in damages, and there being no fraud or circumvention in the case, no doubt was made of the legality of the contract. And of that opinion was the Ld. Keeper in this Case, and upon a re-hearing discharged an order made by the Master of the Rolls to the contrary, and dismissed the plaintiff's bill. Wereupon upon an appeal to the house of lords, and hearing the cause there, all the lords but three or four were of opinion that all such contracts are of dangerous consequence; and the decree of dismissal was reversed, and the bond to be void. 3 Lev. 411. Hill. 6 W. 3. C. B. Hall & al. v. Potter.

S. P. and C.
and 5*l.* given
as actually
paid were
ordered
to be refund-
ed, per
Wright K.
Mich. 1700.
2 Vern.
392. Smith
v. Bruning.

9. A note was given for 50*l.* to a maid servant to use her endeavours to procure such a match. She marries one who knew nothing of the consideration of the note, and who married her on account of the note, so that he might be look'd upon as a purchaser of this note for a valuable consideration, without notice of the reason for which this note was given, and yet the note was set aside. Arg. 10 Mod. 448. cites it as the Case of Goldsmith and Bunning.

—Abr. Equ. Cases 89, 90. Goldsmith v. Bruning. S. C.

The lease
was men-
tioned to be
inconsidera-
tion of
2600*l.* and

10. Lease by tenant in tail, in consideration of procuring a match between Mr. Thynne and the Lady Ogle, was set aside at the suit of the remainderman. 2 Vern. 445. Mich. 1703. Stribblehill v. Brett.

it was tried twice at law, if the marriage were the consideration of the lease; and verdict both times for the lessee, and so the bill was dismissed; but on appeal, the lords reversed the decree, and set aside the lease without regard to the verdicts. Ch. Prec. 165. Tr. 1701. S. C.

Ch. Prec.
267. Mich.
1708. Anon.
S. P. and
seems to be
S. C.

11. B. had 1200*l.* left her by an aunt.—C. courted B. and to get the consent of A. B's father.—C. gave A. a bond to repay 200*l.* if the wife dy'd without issue, or the issue dy'd before 18. Per Ld. Cowper, it is in nature of a brocage bond, and decreed it to be deliver'd up, and defendant to refund what had been paid for interest, but no costs. 2 Vern. 588. Mich. 1707. Keat v. Allen.

S. C. cited
Arg. 10
Mod. 447.
—Hob. 10.
Grielly

12. Wherever a father or mother or guardian insist upon private gain or security for it, and obtains it of the intended husband, it shall be set aside, and such contracts with the father &c. are of the same nature with brocage bonds &c. but of more mischievous

mischievous consequence; and it is now a settled rule; that if the father on the marriage of his son take a bond of the son, that the son shall pay the father so much &c. it is void, being done by coercion while he is under the awe of his father; per *Ld. C. Cowper*. 1 *Salk.* 158. 9 *Ann.* *Duke Hamilton v. Ld. Mohun.* [266]

v. Lother.
contra.—*A.*
had *M.* an
only daugh-
ter, his heir
apparent, to

whom *J. S.* made suit, and he apply'd himself to *E.* mother of *M.* for her assent and recommendation, and on those terms promised *E.* 90 *l.* which she comply'd with; then *A.* died. The marriage was had, and *E.* agreed, and in action for the 90 *l.* judgment was given for her per three justices, contra. *Winch. Mo.* 857. *Gresley v. Luther.*—*Hob.* 10. *S. C.*—Where one of the executors and guardians demanded of *J. S.* who apply'd for leave to court the testator's daughter, that in case he married her, he and she would sign his accounts, and covenant not to ravel back into them, and after the marriage was had, and they sign'd the accounts pursuant to the bond, and afterwards sign'd several other accounts to which the bond did not extend. The guardian and *J. S.* both died, and upon a bill brought by the representative of *J. S.* the husband against the representative of the executor after near 20 years, to open an account, the Court refused to give relief after such length of time, and so many accounts stated. *Sel. Chan. Cases* in *Ld. King's* time. 34. *Trin.* 11 *Geo.* 1. *Western v. Cartwright.*

13. On the marriage of the daughter the mother insists on a bond from the husband to give a release within * two years after the marriage. This is in the nature of brocage bonds, and decreed to be set aside. 2 *Vern.* 652. *Pasch.* 1710. *Duke Hamilton v. Ld. Mohun.*

* *Wms Rep.*
119. says
two days.—
Tho' there
was no sur-
prise, and
the entering

into the bond was done with great deliberation, and tho' there had been no concealment of matters to be accounted for, yet *Ld. Chancellor* thought it ought to be set aside; for the asking it is as much as to say, You shall not have my daughter unless you will release all accounts. *Wms's Rep.* 119, 120. *Pasch.* 1710. *S. C.*

And tho' such release, had it been given after marriage by the husband to the guardian, of all accounts might be good; it would be so, because it must then be presumed to be given freely, yet such presumption cannot be here: for the duke might reasonably apprehend, that the refusing the covenant to release would have lost him the lady. By *Ld. Chancellor.* *Ibid.* 120, 121.

(K) Portions on Condition. In what Case the Breach forfeits the Portion.

1. THREE hundred pounds was given to the plaintiff's wife by her father's will upon condition not to marry without consent of her friends. And upon refusal to pay the money the Court ordered it. *Toth.* 226. [false pag'd] 36 *Eliz.* *Yelverton v. Newport.*

2. In case of a devise to the heir at law on condition not to marry without consent of such persons notice must be given; because she may take the estate as heir at law without any notice of the condition. 8 *Rep.* 89. *Frances's Case.*

S. C. cited
Cart. 172.
—2 *Lutw.*
812. 128.
S. C.—
Skin. cited

and *S. P.* adjudged. *Mich.* 35 *Car.* 2. *B. R.* *Mattoon v. Fitzgerald.*—3 *Mod.* 28. *S. C.*—2 *Show.* 315. *S. C.*—But otherwise it is in case of a stranger. *Vent.* 199. *Fry v. Porter.*—*Mod.* 86. 300. *S. C.*—2 *Lev.* 21. *S. C.*—*Raym.* 236.—2 *Ch. R.* 26. 21 *Car.* 2. *S. C.*

3. *A.* and *M.* had *E.* a daughter, and who was heir apparent to *A.*—*J. S.* courted *E.* and promised *M.* the mother to give her 90 *l.* for her assent and furtherance of the match. *M.* consented accordingly. *A.* died. The marriage took effect, and the mother agreed.

A condition
was annexed
to a legacy
given to a
daughter,

that she
marry with
the consent
of the mo-
ther. She
sued for the

legacy, and it was pleaded in bar that she did not marry with consent of the mother, and yet she had sentence for her legacy. Cited per Winch. J. Mo. 857. pl. 1176. as Pigott's Case.

S. C. cited
by the Mas-
ter of the
Rolls. Sel.
Chan. Cases
in Ld. Tal-
bot's time.
216. in Case
of Hervey
v. Ashton.

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Toth. 227.
S. C. but
not decreed.

agreed. The question was, if the agreement was sufficient consideration for an action upon the case? and Hobart and two justices thought that it was; but Winch. contra Mo. 857. Hill. 11 Jac. C. B. Gresley v. Luther.

4. Conveyance of lands to A. in trust to raise out of the profits, and pay to M. 4000*l.* at her age of 21, or *when with the consent of her father she should be married*; and if she died before such age or marriage, then 1000*l.* of the said portion to be paid to N. and the other 3000*l.* to O.—B. made courtship to M. and the father of M. agreed to give 4000*l.* as her fortune, and a settlement of 800*l.* to be made by the father of B. But while the deeds were preparing, B. and M. marry'd without the knowledge of their fathers, but the father of M. not afterwards disagreeing nor disliking the said marriage, it shall be deemed a marriage with consent of her father. 1 Chan. Rep. 1. 1 Car. 1. Farmer v. Compton.

5. Legacy of 100*l.* to a daughter, and afterwards 100*l.* more is devised by a marginal note to her (*if she behaves herself dutifully to her mother*) the daughter marries without consent of her mother; yet the 100*l.* decreed to her. Chan. Rep. 121. 13 Car. 1 Vintner v. Pix.

6. A portion of 400*l.* was left to be paid at 21 or marriage, so as she married with the assent of the trustees, and her mother and eldest brother. She brought a bill for the portion. The defendant insisted that the plaintiff was about marrying without the assent aforesaid, and refused payment, and offered divers reasons against it. But the Court declar'd it just and reasonable, that the said 400*l.* with damages should be paid to the * defendant. Chan. Rep. 121. 13 Car. 1. Norwood v. Norwood.—The case is thus reported there, without saying that she was 21. And the word * (defendant) at the end should be (plaintiff).

7. Devise to his daughter in tail on condition to have see if she marry one of his true surname; the testator's true surname was Mills, and she married one Mill, who was as often called Mills as Mill; this was no performance. Sti. 389. Olive v. Tong.

8. A. conveyed lands to trustees in trust for his only daughter and heir for 21 years for her maintenance and to raise a portion, and if she marry P. or any other, in the life of A. with A's consent, then in trust for her during the residue of the term. She did not marry P. but married J. S. whom A. disliked, but after some time A. was content with it, and cohabited with them, and then died. Resolved, that A. might agree to the marriage at any time during his life, and therefore in as much as he agreed after, tho' he disagreed at first, it seems it is good; and held, that tho' he disagreed at first, he might agree after. Quære tamen if the agreement relates to this purpose, because by the disagreement the estate was divested. Sid. 133, 134. Pasch. 15 Car. 2. B. R. Prodgers v. Langham.

9. 8000*l.*

9. 8000l. was given to M. *provided she married with consent of A. and if not, then she should have but 1000l. a year.* She married J. S. without A's consent. On a bill by J. S. and M. for the 8000l. the defendant pleaded as above; but the Court overruled it. And Ld. Chancellor, assisted with Hyde Ch. J. and Hale Ch. B. declared this proviso to be *in terrorem only* to make the person careful, and that it would not defeat the portion. But it was said, that *if the portion had been limited over*, it had been otherwise, and in this case the wife was not unequally married. Chan. Cases 22. Trin. 15 Car. 2. Bellasis v. Ermin.

10. A trust for raising money for a *feme sole*, if she marry with consent of the trustees, and if not, then for such as the trustees shall name, or else to themselves, shall enure to the administrator of the *feme sole*, tho' she marries without such consent. Mich. 16 Car. 2. 1 Chan. Cases 58. Fleming v. Walgrave.

Cited 2 Vern. 573. by Ld. Keeper, in Case of Cregg v. Wilson.—

S. C. cited by the Master of the Rolls. Sel. Ch. Cases in Ld. Talbot's time, 216. in Case of Hervey v. Ashton.

11. A. bequeathed to H. his daughter 500l. *to be paid at 21 or marriage*, and made M. his wife and B. his son executors; and by a subsequent clause in his will declared, that it should be in the power of his executors to order and dispose of the 500l. according to their discretion to the use of the rest of the children, unless she marry by advice and consent of the overseers of his will, or the greater part of them. And in the will was a memorandum, that if she married without such consent, she should have but 250l. and the other children to have the rest. H. insisted that there was no devise over. The Court, on reading the proofs touching the approbation of the major part, and their consent to the plaintiff's marriage, decreed the defendants to pay the 500l. and damages. Chan. Rep. 23. 20 Car. 2. Wiseman v. Foster.

A. devised to H. his daughter 3000l. *provided she marry with consent of his executors*; but if she marry without such consent, 850l. is to be abated out of the 3000l. She married J. S. but be-

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fore the marriage the executors consented upon this condition, *viz. that J. S. make a settlement of 400l. a year upon H. for her life, and after upon their issue*; but before such settlement made they married. Upon a bill against J. S. for the 850l. he offered on payment of the 3000l. to make such settlement; and said that conveyances for that purpose had been long ready, and waited only the assignment of a mortgage (by which the 3000l. was secured), to execute the same. The Court dismissed the bill as to the 850l. and held, that it appeared that this was a marriage had with consent of the executors. Fin. Rep. 234. Mich. 27 Car. 2. Bostock v. Ireton.—So where a bequest was of 3000l. but if she married without such consent, *her legacy was to cease, and she to have but 500l. and made the defendant executor, and residuary legatee*; yet the Court decreed her the whole with interest from the marriage, and principally for the same reason, *viz. that it was not expressly devised over but to fall into the surplus.* 2 Vern. 293. Trin. 1693. Garret v. Pritty.—But where a citizen and freeman of London devised two thirds of his legatory part to his daughter; but if she married without the consent of her mother, then her brother to have 500l. of what he had so devised to his daughter, and the daughter married without the mother's consent; the Court held this not a clause in terrorem only; but the 500l. was well devised over; and an interest vested in the brother, who in this case must be looked upon as a person the testator considered and had in his thoughts as to what provision he was to have, and what benefit to take by his will as well as the daughter. 2 Vern. 357. Trin. 1698. Stratton v. Grymes.

12. A. by will devised an estate to his wife for life, and after her decease to E. his granddaughter and the heirs of her body begotten; provided that if she marry without the consent of his wife, or the major part of his trustees &c. then he wills all the premises to his

S. C. cited by the Master of the Rolls. Sel. Chan. Cases

in *Ld. Talbot's* time, 216. in the *Case of HERVEY v. ASTON*, but said, that it is no way applicable to that case, this case of *Fry v. Porter* being a condition annexed to a legal estate; and that of *HERVEY v. ASTON* being an equitable interest only.

his grandson *G.* and his heirs for ever. *E.* at about 14 married without such consent. It was decreed at the Rolls, that this was only in terrorem, and that *E.* and the heirs of her body, should hold and enjoy against the defendant. But afterwards upon appeal the Lord Keeper assisted with *Ld. Ch. J. Keeling*, and *Vaughan*, and *Ld. Ch. B. Hale*, dismissed the bill. And it was said by *Ld. Ch. B. Hale*, that tho' in the civil law, in case of a mere personalty, such limitation over is void; yet this is a devise of lands, which is not governed by that law; and that estates governable by the law of this kingdom, without relation to another form, ought not to be influenced by another law; and *Ld. Keeper* thought, that equity ought not to interpose in this case. *Chan. Cases* 138. to 144. *Mich.* 21 *Car.* 2. *Fry v. Porter*.

But where *B.* knew of the courtship, it being in his own house, and to his son by a former wife, and did not

13. 1500*l.* was left for a portion; but if she marry without consent, then 500*l.* to such person as *B.* and *C.* her father and mother, or the survivor, should direct; they appoint it to themselves and survivor. *C.* dies; the daughter marries without consent; the 500*l.* is to go to *B.* though *B.* was the person that was to give the consent. 2 *Chan. Rep.* 25 *Car.* 2. 95. *Sutton v. Jewke*.

contradict it, or do any thing in it: per *Ld. Cowper* it was a tacit consent, and a fraud in *B.* and decreed the portion. 2 *Vern.* 580. *Hill.* 1706. *Mesgrett. v. Mesgrett*.

14. *A.* by will appointed, that his personal estate (except what was particularly bequeathed to others) should be to the use of his daughter *L.* for her portion and maintenance, and that she should have the interest thereof during the time she continued sole and unmarried; but if she marry without the consent of his executors, or the major part of them, then she should have only the present interest of her portion during her life for her maintenance; and if she die unmarried, then her portion, and the interest thereof to go to *T. T.* the testator's youngest son; and made *C. D.* and *E.* executors in trust, leaving a personal estate of 6000*l.*—*L.* married the plaintiff without consent of the executors; and upon a bill by the plaintiff and *L.* the Court decreed the defendants to account, and the money received by the plaintiff. *L.* or her husband, to be brought into the account and discounted by them; and the master to certify what remains due from the defendants, and the same to be secured for *L.* and such children as she shall have, and the husband not to meddle with it, or have any power to dispose thereof, without making a suitable provision for her and them, which the master is to see done, and the interest in the mean time to be received by the plaintiffs for the support and maintenance of *L.* and her children. *Fin. R.* 145. *Mich.* 26 *Car.* 2. *Shipton & Ux. v. Hampson & al.*

Such devise over must

15. A legacy given to a woman upon condition not to marry
J. D.

J. D. or not to marry without consent of J. S. is only in terror if not devised over, and tho' she marry without consent it does not avoid the legacy. Per Ld. Nottingham. Mich. 1681. Vern. 20. Jervois v. Duke.

be to some particular persons, and it is not sufficient to say it shall go to

the bulk of his personal estate. Mich. 1691. N. Ch. R. 170. Earl of Salisbury v. Bennet. — Yet where the legacy was 100l. and abridged to 50l. and no more on such condition, and testator gave the residue of his personal estate to defendants; this is more than a clause in terror, and defendants shall have the 50l. on disobedience. Abr. Equ. Cases 112. Mich. 1691. Amos v. Horner. — S. C. cited by the Master of the Rolls. Sel. Chan. Cases in Ld. Talbot's time. 15. who said, that indeed that case is contrary to former determinations, but that no resolution was there taken, but it went off for want of parties, and never came on again.

All these cases making such conditions to be only in terror are now over-ruled, and decreed contra per Ld. Hardwick, assisted by Lee and Willes Ch. J. Trin. Term. 1738. in Case of Harvey v. Aston.

16. A. had two daughters B. and C. and bequeathed to each of them 20,000l. provided, that if they, or either of them marry before the age of 16, or without the consent of such persons, that they should lose 10,000l. of the portion, and that the 10,000l. should go to his other children; the Lord Salisbury married one of the daughters under the age of 16, but with the consent of all the parties; it was urg'd, that it being with consent it might be at any age; but my Lord Keeper North was of opinion, that both parts must be observed. 2 Vent. 365. Pasch. 36 Car. 2. in Canc. The Ld. Salisbury's Case.

Skin. 285. S. C. by the name of Ld. SALISBURY v. BENNET. and reports, that the payment was to be made at their respective ages of 25, or days of marriage,

so as such marriage be not before 16. and so as it be with the consent of D. E. and F. and if either marry otherwise, then such daughter shall have only 10,000l. without saying what shall become of the other 10,000l. and then devises his estate to his two daughters after debts and legacies paid. C. married under 16, but with consent of the trustees. Upon proof that testator had in his lifetime made overtures of marrying her to the same person, and there being no express devise over, but only that in such case 10,000l. was directed to go to the bulk of A's personal estate, and which was ordered to be laid out in lands, the whole portion was decreed her.

17. Clause in a deed was, that in case his daughter should live to attain the age of 16, and should refuse to marry J. S. then J. S. to have 20,000l. out of his personal estate, and after there is another clause, viz. and if it shall happen that the said intended marriage shall not be had till after she is 16, then he, upon such marriage had, settles his estate real and personal upon J. S. and his intended wife for their lives &c. A marriage was had before 16; and after 16, and before 17, the wife died. Jefferies C. decreed an account of the profits, of the real estate received by the trustees in the wife's life-time to be made to J. S. as administrator of the wife, and that the words of the settlement did in no sort imply that the daughter and J. S. might not marry before 16. Vern. 338. Mich. 1685. D. of Southampton v. Cranmer & al. executors of Sir H. Wood.

18. Lands are settled upon a daughter, provided she marry with her father's consent; she marries a first husband with his consent, and a second husband without his consent; this is no breach of the proviso. 2 Chan. Rep. 363. 1 Jac. 2. Fenwick v. Smallwood.

19. A. devised to trustees and their heirs upon trust to employ 3 Chan.

Cases 129.
S. C.—
1 Salk. 231.
S. C. de-
creed accord-
ingly; but
says it was
reversed on
appeal to the
House of
Lords.—12
Mod. 185.
says there

[270]
was no de-
termination,
but that it
was ended
by compro-
mise.—So
is 2 Vern.
344. S. C.
—S. C.
cited by the

Master of the Rolls. Sel. Chan. Cases in Ld. Talbot's time, 216. Mich. 1736. in Case of HERVEY v. ASTON. And his Honour said, that this case was not applicable to that; nor would it be an authority scarcely in any case from the peculiarity of its circumstances.

ploy the profits for the first three years to certain uses, and after that the *trustees should stand seised in trust for his niece H. W. for her life, in case she shall within three years after his decease be lawfully married to Fr. Ld. G. and in such case remainder to the issue male begotten on her body by the said Ld. G. But if there be no such issue, or in case such marriage shall not take effect within three years, then in trust for J. S. for life, remainder to his first &c. son in tail, and for want of such issue to W. R. for life &c.* Soon after the making the will a codicil was added providing that a marriage *infra annos nubiles* should not be sufficient, unless confirmed at the age of consent. Proposals were made by the young lady's friends to Ld. G. but being refused she married another person. Ld. Sommers, assisted by Holt and Treby Ch. J. decreed, that the condition precedent not being performed, no relief could be had for the young lady, but that the estate must go over to the next in remainder, this being a condition of marriage, which is a thing which cannot be valued. 12 Mod. 182. Hill. 9 W. 3. Bertie v. Ld. Falkland.

20. But Ld. Sommers said, that if the Ld. Falkland the remainderman had *done any unfair act to hinder the marriage*, he being to have advantage by it, equity might have relieved. 12 Mod. 184. Hill. 9 W. 3. S. C.

21. The uncle by lease and release settles land *to the use of himself for life, remainder to A. remainder to A's 1, 2, 3, and 4th sons in tail, remainder to B. in like manner, with power of revocation, and a proviso, if A. marry without the consent of the uncle during his life, and after his death of J. S. &c. then the uses limited to A. and his sons to cease, and then to be to the use of B.*—A. married without consent, having no notice of the conveyance or proviso. But the *uncle (who knew not of the marriage)* entertained him kindly and gave legacies to A. by his will and died. B. disturbs A. because of the forfeiture; and dismis'd to law. But the Chancellor asked, if it were a *limitation of a trust, or of an use?* And being of an use the Ld. Chancellor said, then it is at law. 2 Chan. Cases 109. Trin. 34 Car. 2. Booth v. Booth.

Ch. Prec.
226. S. C.
—S. C. and
the particu-
lar reason
cited by the
Master of
the Rolls.
Sel. Chan.
Cases in Ld.
Talbot's
time, 216.

in Case of Hervey v. Ashton.—Fin. R. 62. Hill. 25 Car. 2. Needham v. Vernon and Booth. In which case the portions were payable at marriage with consent, but the daughters were ad-
vanced in years.

22. A. devised portions to his daughters *without saying any time for the payment, provided that they marry with consent of B. and if any marry without, her portion to go over.* Bill by daughters for their portions. Per Wright K. it is a condition subsequent, and the portions are vested, yet the Court cannot relieve against a forfeiture, because of the devise over. Decreed the portions to be paid but on security, to refund in case the condition should be broken. 2 Vern. 452. Mich. 1702. Aston v. Aston.

23. A. devised part of his *real estate* to his heir charged with payment of 2500 l. to M. his daughter, and other part charged with payment of his debts. The portion was to be paid at 21, or marriage; provided if she marry in her mother's life without her consent, then 500 l. to cease, and to be applied towards payment of his debts charged upon the other lands. The daughter after 21 marries without consent. Ld. Harcourt held, that this in effect is no devise over; for here appears to be no creditors concerned that are in danger of losing their debts, and that the daughter was intitled to the whole by her attaining 21 unmarried, and decreed the whole 2500 l. to be raised, and the husband to make a settlement, and till then the money to be brought before the Master. Ch. Prec. 348. Mich. 1712. King v. Withers.

Abr. Equ. Cases 112. —G. Equ. R. 26 Hill. 9 Ann. S.C. —S. C. cited by the Master of the Rolls. Sel. Chan. Cases in Ld. Talbot's time. 216. in Case of HERVEY v. ASHTON, for which he

said, it was an express authority, but that he could not agree to what was there said, that trust money to arise out of lands must have the same construction that the lands themselves would.

24. A. by his will bequeath'd to his granddaughter an annuity of 10l. for life, and afterwards by a codicil declared, that if she should marry with the good liking of his trustees, she should have 150l. in lieu of the annuity, and the annuity to cease. She married one worth nothing, and without consent of any of the trustees. Ld. Cowper decreed, that she should not have the 150l. saying, that here was a provision either way, and where the provision is in the alternative, and there is a condition precedent to the gift of the portion, (viz.) if she marries with consent &c. and that is not perform'd, and the child is still provided for, tho' not with the greater portion, equity does not relieve. Wms's Rep. 284. Mich. 1715. Gillet v. Wray. [271]

25. Lands devised in trust, that his daughter M. shall receive the rents till her marriage or decease, and in case she marry with consent of the trustees, then to convey the premises to M. and her heirs. But if she dy'd unmarried or marry'd without consent, then to convey to other uses. M. afterwards marry'd with consent of her father, who settles part of the land on M. and her husband, and dies. The settlement is no revocation of the will as to the other lands to the daughter, and by her marrying with consent of the father in his life-time the condition is dispensed with; per Cowper C. 2 Vern. 720. Mich. 1716. Clerke v. Berkley.

26. A. had three daughters B. C. and D.—An amour being carried on in the life of A. between J. S. and B. the same was much disliked by A. and he declar'd if B. married J. S. he would not give her a groat. Thereupon J. S. discontinued his suit. Afterwards A. by will devised all his real and personal estate to his executors in trust, to pay B. 35 l. a year for her maintenance and no more, and to C. so much &c. And if B. marry with consent of my executors, then I devise to her 1000 l. in part of her portion, to be paid at 21 or marriage, which shall first happen, and at the end of 3 years such and such mesuages to be to B. for life without impeachment of waste, remainder to her first &c. sons in tail,

tail, remainder to daughters &c. paying to his wife 70l. a year for her life. And he devis'd in the like manner to his other 2 daughters, only that in the devise to C. nothing is said relating to her marrying with consent, but in the devise to D. immediately after the devise of 1000l. and before the devise of the houses it is said, viz. If she marry with consent of &c. I give her all such and such mesuages &c. (being others than those given to the other sisters) and concluded with giving the *overplus*, which he doubted not but such there would be, to his said three daughters to be equally divided between them. A. died, and then J. S. renew'd his addresses to B. The executors expressed their dislike and sent notice thereof in writing, and also of A's will, and the danger she run, and that they could not consent by reason of A's dislike in his life-time. This cause came on in the Dutchy Court, before Lechmere Chancellor, assisted by Ld. Ch. J. King and Dormer J. and the two first held the fortune not forfeited by the marriage without consent, but the other e contra. The reasons against the forfeiture were, 1. the looseness of the expressions and the want of coherency, from the omission of such condition as to C. and the place of its insertion as to D. 2. There is *no devise over*, or any further notice taken of it. Nor will the devise of the overplus carry it. And that the want of a devise over made it to be only *in terrorem*. Ch. Prec. 562. Pasch. 1721. Semphill v. Bayly.

27. A legacy was given by will to M. S. on condition that she *marry with consent of both the executors*; upon a proper match proposed *one consented*, but the other was obstinate and *would not*, which being laid before the Court, and the dissent of the executors appearing to be without just cause, the want of such consent was supplied; cited per the Master of the Rolls. Trin. 1731. in the Case of Peyton v. Bury. 2 Wms's Rep. 628.

28. A. by settlement after marriage created a *term of 1000 years in trust by mortgage or sale to raise 2000l. for each of the daughters portions, provided they marry with their mother's consent; and if either die before marriage with such consent, her portion to cease and the premisses to be discharg'd; and if raised, then to be paid to the person to whom the premisses should belong; and afterwards by will created another trust-term to augment their fortunes 2000l. a-piece more, but subject to the like condition, as in the settlement, and gave the residue over and above the 2000l. a-piece to his* [272] *wife; and by a codicil created another trust-term, for the better raising of his daughters portions. A. died, leaving two daughters, J. and K.—J. after age of 21 married R. S.—and K. before 21 married W. R. and both without the mother's consent. They and their husbands brought a bill for their portions. The Master of the Rolls took notice of the clause declaring that if any die before marriage with such consent her portion should cease, which was insisted upon by the counsel to be a sufficient disposition of it; but he said, that surely this was not a good disposition within the meaning of those cases, that allow a*
limitation

limitation over to be good ; for *this is not to take place upon marriage without consent, but upon dying before marriage with such consent, and is no more than providing for daughters dying unmarried ; he taking it all along, that if they married they would do it with consent ;* that here does not appear to be any person in the testator's view, to whom these fortunes should go over, as in other cases where those limitations over are allowed ; that tho' these portions are charged upon land, yet there being *no distinction between conditions annexed to money charg'd upon land, and such as are to arise out of the personal estate,* and portions by will being due by the ecclesiastical law notwithstanding such condition as this annexed to them, portions by settlement (tho' under the like conditions), are likewise due by the law and rules of this Court ; and therefore thought the plaintiffs the daughters well intitled to their portions ; and so order'd the husband of the one to make proposals before the Master as to settling his wife's fortune ; and that the fortune of the other should be paid to her, her husband being dead. Sel. Chan. Cases in Ld. Talbot's time. 212. Mich. 10 Geo. 2. *Hervey v. Ashton.*

29. Where the marriage is to be with consent of *trustees*, the consent of one only is sufficient ; per Wills Ch. J. in Canc. Trin. 1738. in Case of *Harvey v. Aston.*

30. *Conditions against marrying generally are void in law ; as where a legacy of 500 l. is given to a woman, if she doth not marry, and only 300 l. if she doth marry ; afterwards she married, yet she shall have the 500 l. because the condition annexed to that legacy was void.* Nels. Abr. 1162. Marriage (E) pl. 1.

31. All conditions against the liberty of marriage are unlawful ; but if the *conditions are only such, as whereby marriage is not absolutely prohibited, but only in part restrained, as in respect of time, place or person,* then such conditions are not utterly to be rejected. Thus an executor or a legatary made on some condition against the liberty of marriage, may, notwithstanding the nonperformance of such condition, obtain the executorship or legacy ; yea if the testator make one executor, or give him a legacy upon condition, *that he marry with the consent,* and according to the good liking or appointment of some other person, this condition is unlawful. Infomuch, that if such executor or legatary marry contrary to such restraint or condition, he shall notwithstanding be admitted to the executorship, and receive the legacy, as if no such condition had been express'd ; (*quære, whether he be not obliged to ask his consent, tho' not to follow it ?*) ; for the law rejects all conditions made against marriage, or that are impediments to marriage ; notwithstanding which an executorship may be assumed, or a legacy demanded, as if no such condition had been made. Yet an annuity bequeath'd by a man to his wife for so many years, if she shall remain after his death a widow and unmarried, is good. Godolph. Orph. Leg. 45. cap. 15. s. 1.

If I bequeath 20*l.* to E. F. so as she marry with the good liking and consent of A. B. she must marry, otherwise she has no [273] right to the 20*l.* But she is not obliged to have the consent of A. B. therein; yea she shall

32. Notwithstanding what has been said, the condition holds good, if the testator makes one his executor, or give him a legacy, *if he marry not without the counsel or advice of another person*; so that the testator giving him a legacy, if he marry with the counsel or advice of another person, he is excluded from the legacy, if he marry without such counsel or advice; yet in this case he is *not bound to follow such counsel or advice, but only to request the same*. Again, although the condition of marrying with the consent of another is void, so as the party on whom such condition is imposed, may obtain the legacy without such consent, *yet marry he must*, or he cannot obtain the legacy; for altho' the condition of such consent be unlawful, yet must he marry before he can pretend to the legacy, because that part of the condition is not unlawful. Godolph. Orph. Leg. 46. cap. 15. f. 2.

have the legacy, tho' she marry not only without his consent, but also tho' A. B. be altogether unacquainted therewith, or knowing thereof should contradict it, unless it be appointed in the will expressly, that in case she marry without such consent, the said legacy of 20*l.* shall be and enure to such or such pious uses specially mentioned in the said will. Godolph. Orph. Leg. 381. cap. 17. f. 2. — But if I bequeath 100*l.* to A. B. so as she marry with the advice of C. D. in this case A. B. shall not have the said legacy, unless she require or desire the advice of C. D. Albeit she be not obliged to follow his advice therein, yet she is obliged to ask his advice, or she cannot have the said legacy. The reason of the difference in this case from the former is, that in the former there may be a total impediment to marriage itself; in this it is otherwise. But if C. D. be dead, whereby the condition is rendered impossible; in such case it is as if it were performed; provided that C. D. were dead before his advice could well be asked or required. Godolph. Orph. Leg. 381. cap. 17. f. 3.

33. Altho' a condition directly contrary to marriage annexed to a legacy in a will is a void condition for that very reason, yet the *civil*, or rather the *canon law* doth distinguish in this point *between a virgin and a widow*, and says, that such conditions against marriage (as to a virgin) are void; but allows them as to widows, especially if the legacy be given by a husband to his own wife, or by a son to his mother. Godolph. Orph. Leg. 382. cap. 17. f. 9.

(K. 2) Conditions annexed to Portions determined.

1. A. Bequeathed the residue of his personal estate to J. S. provided she marry with consent of B. and C. his executors (who were but executors in trust), and if J. S. marry otherwise then he devised over the residuum to J. N. Afterwards B. died, and then J. S. without C's consent, married to a common mariner. The Master of the Rolls decreed, that J. N. had no title to the residuum; for that this was a *condition subsequent*, and this consent directed to be had, being like a bare authority, and so different from that which is coupled with an interest, could not survive without express words for that purpose, and thinking the bill brought by J. N. for the residue frivolous he dismissed it with costs. Trin. 1731. 2 Wms's Rep. (626) Peyton v. Bury.

(L) *Settlements by Agreement before Marriage. What is a good Performance. In regard of the Manner.*

1. **B**OND condition'd, that after his marriage, and having a son by his wife, he would *convey lands in tail to such son* to enjoy. A feoffment to a stranger to such use is not sufficient, but the *infant* must be made a *party to the conveyance*, and there ought to be a deed to prove his estate, and means to prove the uses limited. Cro. E. 825. Pasch. 43 Eliz. C. B. Stutfield v. Somerset.

2. *Infant* upon his marriage *promises* to make a settlement when he comes of age on his wife and her issue; a settlement made 3 or 4 years after his age of 21 and not directly *pursuant to the said promise* shall not be presumed to be made in performance of the said promise, without direct proof. 2 Lev. 147. Mich. 27 Car. 2. B. R. Lavender v. Blackstone.

3. A. on his son B.'s marriage covenants to *settle a jointure on the wife and her issue*, but no *provision for B.* is made during his life. A. has part of the portion, and the wife dies without issue; the question was whether B. was intitled to any estate in lands? Ld. North advised them to end the matter by compromise. Mich. 1683. Vern. 198. West v. Ld. Delaware and Cutler. [274]

(M) *Settlements. Performance good. In regard of the Matter.*

1. **A** Term was convey'd upon trust to be void upon purchasing and settling on the husband for life, and after upon his wife for life, with remainder over, *an estate of an indefeasible title*, and not tithes &c. and this trust was declared by deed indented. The husband desired, and accepted of lands part of a *delinquent's estate* forfeited in lieu and satisfaction of what was to be done. The delinquent, on the King's Restoration entered. Decreed by Finch C. that the trustees surrender the lease to the purchaser of the lands which were aliened by the husband. Chan. Cases. 298. Trin. 29 Car. 2. Boynton v. Sir Robert Sprignall.

So note, a trust by deed interpreted to be satisfied by lands of a bad title, tho' the deed of trust be of an indefeasible title on proof of discourse, and mentioning

that the meaning was to settle delinquent's lands, and the same covert was bound by the agreement of the husband. Ibid.

2. By articles before marriage a settlement was to be made of 700*l.* a year; and after, but during the wife's infancy, a *particular of lands* was given to and accepted by the wife's father as of 700*l.* a year, but they were only 500*l.* a year. Decreed to be made up 700*l.* a year; but had it been a *parol* agreement only, or the value proved deficient by accident afterwards, no relief woul Vern. 217. S. C.

would have been given. Skin. 158. Hill. 35 & 36 Car. 2. Speake v. Bedley.

3. Marriage articles were to *lay out 1000 l. in a purchase of land to be settled on husband and wife for their lives, remainder to the issue of the marriage, remainder to the husband in fee*; husband lays out the 1000 l. in the purchase of a *great house and gardens and farm, which would let but at 25 l. per ann.* It is a good *performance* of the articles, the father of the plaintiff having viewed the estate before the purchase was made. Vern. 345. Mich. 1685. Tunbridge v. Teather.

(N) Settlements *after Marriage without Articles, or Agreement precedent. Good in what Cases.*

1. **I**F the *feme joins in a fine* and so bars herself of her dower, this may make a settlement made on her after marriage to be a *good consideration*, which otherwise would be merely voluntary against *creditors or purchasers*; otherwise if she did not join in the fine, and so remained dowable. 2 Lev. 147. Mich. 27 Car. 2. B. R. Lavender v. Blackstone.

[275] 2. A. seised in fee of a manor makes a *mine-adventuring agreement* with B. C. and D. who after much labour and expence made some good discoveries. Before this agreement A. had made a settlement of his said manor on his wife and son with power to charge it with 3000 l. for younger childrens portions, but this was purely a voluntary settlement. A. dies and the widow and son would hinder the working, and set aside the agreement by insisting on the settlement. The partners brought a bill for relief, the Court took time to consider of it, but inclined to decree for the plaintiffs for execution of the agreement against the voluntary settlement. 2 Vern. 326. Mich. 1695. Shaw v. Standish.

3. A second marriage settlement is *recited to be in consideration that the wife had parted with the former settlement*, which appeared to be made after marriage but was recited to be *made in consideration of a marriage portion* secured, but *no proof of any previous agreement* for such settlement, yet the Court presumed it; and so the second not voluntary against *bond creditors*. Mich. 1699. Ch. Prec. 101. Anon..

4. J. S. made a settlement *on his eldest son for life*, with remainder to his first and other sons in tail, remainder over, *with power for his son to appoint any of the lands not exceeding 100 l. per ann. to any wife he should afterwards marry for a jointure*, (the father being under an apprehension that he was then married to a woman which the father disliked, and had no intention his son should provide for her); the father died, and the son married her (tho' there was strong *presumptive proof that he was married to her before*), and after marriage *appointed certain*

lands to trustees in trust for her for a jointure, and covenants, that if they were not of 100 l. per ann. value, upon request made to him any time during his life he would make them up so much out of other lands in his power. He lived several years and no complaint was made that the lands were not of that value, nor request to make it up, and died without issue. On a bill brought by the widow to have the jointure made up 100 l. my Lord Keeper said, that a provision for a wife or children was not to be considered as a voluntary covenant, and therefore decreed the deficiency to be made up, notwithstanding the circumstances of the case, and her neglect for not requesting it during coverture. For the laches of a feme cannot be imputed to her. Abr. Equ. Cases 222. Hill. 1701. Fothergill v. Fothergill.

5. A. married an orphan of the city of London, and upon payment of the portion by the chamberlain covenanted with him and J. S. to levy a fine of lands to the use of himself for life, then to his wife for life for a jointure, remainder to the heirs male of their two bodies, remainder to his own right heirs; A. died without levying a fine leaving B. a son and M. a daughter; the wife died; B. became indebted and covenanted with his creditors to levy a fine, and devised the lands to them and died without issue; Lord Harcourt and after Lord Cowper decreed the lands to the daughter. Ch. Prec. 425. Mich. 1715. White v. Thornborough. G. Equ.
R. 107.
S. C.

6. 'Tho' a settlement be executed after marriage, yet if the portion be paid at the same time, it cannot be looked upon to be voluntary, but will be as effectual as a settlement made before marriage; and so it has always been held; Arg. and decreed accordingly, first by Ld. Harcourt, and after by Ld. Cowper. Ch. Prec. 426. Mich. 1715. White v. Thornborough.

7. The husband, after marriage, in consideration of an additional portion of 100 l. paid by his wife's mother (a receipt whereof was indorsed on the deed), settled lands of 100 l. a year upon himself for life, remainder to his first and other sons &c. And the husband's mother, who had an interest in the land, joined with him in the conveyance. The husband 13 years after mortgages this estate with usual covenants, and dies. Mortgagee brought a bill to foreclose. Ld. Chancellor thought it would be very hard to call this a fraudulent settlement, it being in consideration of a marriage had, and of an additional provision of 100 l. and cannot be called voluntary against a creditor lending money 13 years after. That the indorsement was plain proof that 100 l. was paid, and tho' for the consideration of 100 l. a year, yet in marriage settlements things are not to be construed so strictly, there being room for bounty; and every man is bound to provide for his wife and family. Besides that, the estate that moved from the husband's mother (defendant's grandmother) may make him to be considered, in some respect, as a purchaser of the limitations to her grand-children. [276] Sel. Chan. Cases in Ld. Talbot's time. 64. Hill. 1734. Jones v. Marsh.

Creditor.

(O) Settlements after Marriage. *By Agreement before Marriage. Good as to Creditors &c.*

1. *Settlement in pursuance of articles precedent to the marriage* has not the least colour of *fraud* whereby a *purchaser* may avoid it, and if there had been but a *verbal agreement* for such a settlement it would have served the turn. Vent. 194. Pasch. 24 Car. 2. B. R. Sir Ralph Bovey's Case.

The executor of the father sued the bond against the wife as administratrix to her husband; decreed that this bond be paid prior

2. A. on the marriage of M. his daughter to B. agrees to give 500*l.* *portion* and B. gives 3000*l.* *bond to A. to settle 1500*l.** on M. and her heirs in money, lands, or otherwise within a month, but died without settling it. 300*l.* *of the 500*l.* was only paid,* and the other 200*l.* was lodged in M's lawyers hands; judgment was had upon the 3000*l.* bond and was pleaded in bar of other debts, and decreed accordingly that she be first satisfied her 1500*l.* out of the estate of B. 2 Ch. R. 103. 26 Car. 2. Hodkin v. Blackman.

to other debts, but the administratrix to discover assets and account, and that money part of the portion remaining in a trustee's hands be brought into the account, and that assets remaining after the 1500*l.* paid shall go to satisfy other debts. Fin. R. 232. Trin. 27 Car. 2. S. C.

3. A. indebted 700*l.* agrees on marriage to settle *his lands of 100*l.* per ann.* on himself for life, then to the wife for her jointure, remainder upon the issue in tail; the lands were decreed to be sold to pay the 700*l.* and the surplus of the money to be laid out and settled on the wife and the issue, without any provision for the husband; but reversed by Ld. North. Vern. 203. Mich. 1683. Carpenter v. Bennet.

(P) Marriage Agreements *unperformed. Decreed.*

The case was, the father agreed to give an

1. *Marriage agreement (after a trial at law) was decreed to be made good.* 2 Chan. Rep. 92. 25 Car. 2. Harmer v. Brook.

additional portion, the marriage is had, and then the *father pretends the marriage was against his consent*, and dies, and leaves his estate to a nephew; yet the agreement was decreed. 2 Ch. R. 92. Harmer v. Brook—Fin. R. 185. Mich. 16 Car. 2. S. C.

Abr. Eq. Cases 63. pl. 3.

2. The baron before marriage *articled with the feme to make a settlement of certain lands before the marriage should be solemnized upon him and her (the now plaintiff) and the heirs of his body by the plaintiff.* But they *intermarried before the settlement made*; then the baron died; and on a bill by the widow for an execution of the articles, it was decreed against the heir at law of the baron, tho' objected that marrying before the execution of the settlement was a waiver of the articles and the benefit of them, and she being the only party with whom they were made, her marriage

marriage with the other party before performance was a release in law. 2 Vent. 343. Mich. 30 Car. 2. Haymer v. Haymer.

3. A. being tenant in tail with power to make a jointure, in consideration of 3000 l. paid, covenants to settle 300 l. per ann. but no particular lands mentioned, out of which the 300 l. per ann. should be made up; afterwards A. dies, no settlement made, so that *A. executed not his power*; the question was if *A. dying before any execution*, the Court should decree it? Lord Chancellor inclined strongly for the widow in regard of the consideration, and because A. had power by the will to have [277] done it. See 2 Chan. Cases 28, 29. Pasch. 32 Car. 2. and Pasch. 34. 87. Hele v. Hele.

4. T. G. in 1653, being seised of certain lands in fee of the value of 14 l. per ann. and there being a marriage in treaty between the plaintiff (the brother of T.) and A. W. he the said T. *did make a writing* sealed and delivered by him, which was to this purpose, viz. *That if the marriage takes effect between my brother and A. W. she being worth 160 l. I do promise, that if I die without issue, to give my lands in &c. to my brother and his heirs, or to leave him 80 l. in money*, and for the true performance of this, I bind myself, my heirs, executors and administrators. After which the brother (the now plaintiff) and the said A. W. did intermarry, and she was worth 160 l. but T. G. *did afterwards marry and*, having no issue, *he did settle the lands upon his wife for life, the remainder to his own right heirs* (this was a jointure settled before marriage), and did afterwards devise the land to her in fee, *and died without issue*; his wife afterwards devised it to the defendant's wife in fee; and now the plaintiff exhibited his bill to have the land conveyed according to the agreement above. But for the defendants it was much insisted upon, that this being to settle the lands, in case T. should die without issue, it should not be regarded in this Court; for the execution of a trust of a remainder, or reversion in fee upon an estate tail, shall not be compelled, because it is subject to be destroyed by the tenant in tail, as here T. might have done in case he had made a settlement according to the import of that writing, who therefore could not have been compelled himself to have executed this agreement; but the Lord Chancellor Finch decreed the land for the plaintiff, because it was proved that the marriage with the plaintiff's wife was in expectation of the performance of this agreement; and he was obliged to have left the land to the plaintiff if he had no issue. 2 Vent. 353. Mich. 33 Car. 2. Goylmer v. Paddiston.

5. Agreement on marriage was to settle 500 l. per ann. jointure; lands were settled but they were worth only 400 l. per ann. Decreed per Jeffries C. to make up the lands 500 l. per ann. and this on the evidence of the father and uncle, that when the husband proposed the treaty of marriage he offer'd to settle 500 l. per ann. and after took notice that the jointure settled was not of that value, and talked of making it up so much; but no covenant

covenant or agreement was proved, whereby he bound himself to make a jointure of that value, and the portion was not equivalent; but *the husband was trusted to draw the settlement.* Vern. 17. Mich. 1681. Benson v. Bellasis.

6. A. on his marriage with D. for the settling a jointure on the said D. in full of all jointures, dowers, and thirds, which she might claim out of his real and personal estate, conveyed lands to the use of himself for life, and after to the said D. for life in full of all jointures &c. with this *proviso*, that *if she claim any part of the personal estate by the custom of the province of York, then the estate to be to other uses*; she is bound by the said settlement, and ought not to claim any part of the personal estate; per Finch Lord Chancellor; reversed by Lord North; but confirmed by Jeffries Lord Chancellor. 2 Chan. Rep. 252. 34 Car. 2. Benson v. Bellasis.

7. A. covenants on marriage of B. his eldest son to the daughter of J. S. with whom 4000l. was to be paid to A. as a portion, to settle lands on B. and his wife for their lives, with remainder to the first &c. son in tail male successively, remainder in fee to the son. A. brings a *bill* to be relieved against the articles as gained by *surprise*, and *that it was intended to limit the remainder to C. a second son of A. on failure of issue male of B. and charged only with portions for daughters*, and prayed the Court to direct the settlement to be made so; sed non allocatur, per Ld. North. Vern. R. 320. Pasch. 1685. Seymour v. Fotherly.

8. A. on marriage of B. his son covenants *to settle lands* to the use of B. for life, then to the wife for life, remainder to the heirs male of the body of B.—A. dies and makes B. executor, B. dies and makes a second wife executrix; grandson brings a bill to have satisfaction of the executrix on the covenant, or that he might sue it in the trustees names; but the bill was dismissed, the plaintiff's father being tenant in tail, and *might have barred the plaintiff if a settlement had been made.* Vern. 480. Mich. 1687. Sir William Cann v. Lady Cann.

9. The father on a treaty of marriage between B. and M. his daughter articles with B. to give M. 3000l. and B. was to make a settlement. The father makes his will *in the interim and devises all his estate to trustees to the use of his daughter for life, remainder over.*—B. having notice of this will, marries M. and makes a settlement pursuant to the *articles with the father*; per Ld. C. Cowper B. is intitled to the 3000l. tho' he had notice of the will. 2 Vern. 660. Trin. 1710. Trafford and Ux. v. Sir R. Ashton.

10. The husband gave bond to the wife's father before marriage *to settle certain copyhold lands*; and upon a bill to compel as surrender, the same was decreed, and in a stricter manner than the bond specified, and that till the surrender the lands should be held and enjoyed according to the uses. G. Equ. R. 114. Pasch. 1 Geo. 1. Nandike v. Wilkes.

11. A.

The practice is contrary. New [278] Abr. Equ. Cases 395. Marg.

11. A. by marriage articles *covenanted to settle the manor of Dale* on his intended wife, *or to leave her 1000l. within three months after his death.* By this agreement A. has all his life-time to do the one or the other, and the wife cannot compel him to do either; nor can she by bill, or otherwise compel him to *give further, or better security for payment* of this 1000l. For she had the security, which she at first agreed to take, and the Court cannot better it *against her own agreement.* See Wms's Rep. 460, 461. Trin. 1718. Bosvil v. Brander.

12. A. had M. a daughter but no present estate or certainty of any future one, and was highly under his father's displeasure, whose eldest son he was, and who had a very considerable estate. A. encouraged B. to court M. and *before marriage gave a bond to B. of 5000 l. penalty reciting the intended marriage, and A's agreement to assure one third part of all such real estate as should come to him on his father's decease to B. for life, remainder to M. for life, remainder to the heirs of the body of M. by the said B. remainder to the right heirs of A. and the condition was to do it within three months after his father's death.* Soon after the father died intestate, by which a great real estate came to A. Lord C. Macclesfield decreed an execution of the agreement, and would not admit the payment of the 5000 l. penalty as a satisfaction, but *varied the limitations*, directing that they should be to B. and M. for their lives, remainder to their first &c. son in tail male, remainder to their daughters in tail general, remainder to A. in fee, and that A. account for the *mesne profits from the end of three months after the father's death*, and be examined upon interrogatories touching the real and personal estate, and to produce all books, papers, and writings upon oath, and pay costs. 2 Wms's Rep. 191. Mich. 1723. Hobson v. Trevor.

(Q) Agreements unperformed, decreed *after the Death of Husband or Wife.*

1. B. Covenants to *levy a fine* to P. of lands given in marriage with his daughter *at a day*; by negligence of payment the daughter being dead, P. passed away the land to purchasers, but B. was ordered to an estate of 100 marks. Toth. 109, 110. cites Hill. 15 Jac.

The original is so, Quære the meaning.

2. By marriage articles the husband agreed to settle a leasehold on the wife, which he did, and was to have 1000 l. which was to be laid out in land, and settled on them and the issue, remainder in fee to the husband; the agreement was decreed to be performed by the father of the wife as to the payment of her portion, tho' the *wife is dead without issue.* Fin. R. 244. Hill. 28 Car. 2. Bacon v. Clerk.

And tho' the husband is dead also; and the husband being to add an equal sum to the portion to be

laid out in land and settled on the husband and wife in tail, and nothing said of the fee; the whole money was decreed to the heir of the husband. 2 Vern. 20. Pasch. 1687. Knight v. Atkins.

3. A.

3. A. the father on the marriage of B. his son with M. articked with C. the father of M. in consideration of 6000*l.* *to be charged on lands*, being the portion of M. *such particular lands should be settled on M. in jointure*, and on the issue of the marriage. After the marriage M. died *without issue*, and her portion not paid, and *the lands not settled* to secure the 6000*l.* nor was the jointure made or could be made had M. been still living, because A. had *disabled himself to make the jointure by having conveyed away part of the lands*, so that C. thought himself not bound to pay the 6000*l.* Decreed the 6000*l.* with interest, or in default, the lands agreed by the articles to stand as a security for the payment thereof, to be possessed by the plaintiff till paid, and the *disability of A. was not B. the plaintiff's fault, because A. had given security*, that it should be done if M. had lived. Fin. R. 261. Trin. 28 Car. 2. Hollis v. Carr and Temple & al.

4. A. on the marriage of B. his son with M. an orphan of the city of London *conveyed lands &c. to the use of B. for life, remainder to M. for life for her provision, remainder to the first &c. son in tail &c.* But afterwards, before the marriage, M. being a city orphan A. and B. applied to the Court of Aldermen for a licence, and thereupon an entry was made of their consent, provided the common serjeant approve of the settlement, which A. engaged to make *satisfactory if it were not so already*, and B. being required engaged to take up his freedom within a year, and A. engaged that B. should do so. The marriage took effect and many years after B. died leaving M. his widow and several children. Lord C. Macclesfield decreed the personal estate of B. to be liable to the custom of London, and that he should be taken as a freeman of London, he having for a valuable consideration agreed to become such; and he held that the agreeing to take up the freedom of the city, was the same as if he had agreed that his personal estate at his death should go according to the custom; and that such agreement being entered among the other proceedings and orders of the Court of Aldermen is become matter of record, at much as a fine would be if levied there, and this shall be deemed as part of the marriage agreement, and which could not be waved, or released without breach of trust by the Court of Aldermen at whose instance as (political) guardians of the infant it was made. Wms's Rep. 710. to 722. Trin. 1721. 25 August, Frederick v. Frederick.

(R) Agreements unperformed. Decreed *after the Death of both.*

1. A Settlement covenanted by marriage articles to be made by the great grandfather on the grandfather, who after died leaving issue, was decreed to be made accordingly *on the issue and the widow for her jointure.* 3 Ch. R. 29. Mich. 21 Car. 2.

21 Car. 2. Norcliff v. Worfeley.—And the great grandfather having conveyed away the land, another bill was brought by the father (the issue) against the great grandfather and his second son John, and 18 February 1651. it was decreed that the conveyance be made according to the covenant and that they should account for the profits to the father. Ibid. 30.

2. A. on marriage of B. his son with C. covenants for himself executors and administrators, but omits (heirs) to settle 150*l.* per ann. lands on B. and C. and the issue of the marriage, but dies before settlement made; B. enters on the lands as heir and C. being dead marries D. and settled part of the lands on D. his second wife, and devised the residue to his son by the second wife charged with portions for younger children. Bill is brought by the son of the first marriage to have 150*l.* per ann. of the lands whereof A. died seised, settled according to the articles. Per Ld. Wright tho' no lands particularly were mentioned, yet he thought the covenant a lien on the land whereof A. died seised, unless he had purchased and settled other lands within the time limited and which were not settled on the second wife, who came in as a purchaser without notice: 2 Vern. 482. Hill. 1704. Roundell v. Breary.

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Mich. 1682.
Vern. R. 644
in case of
Girling v.
Lee.

(S) Agreements. Decreed. How. Where there is a Failure on one Side.

1. A Freeman of London agreed to settle his wife's portion and his own estate on her and her children. The father of the wife refused to pay the portion, because he had another wife then living, who by the custom of London would have a share in his estate. Decreed that the wife's portion and his own estate shall be settled so that his first wife have no benefit thereof. Fin. R. 429. Mich. 31 Car. 2. Butler v. Harrison and Lamb.

2. A. on marriage of B. his son with C. a widow covenants in consideration of 2600*l.* to settle such lands. 1000*l.* of the money could not be had, being settled on the former marriage, so that it must come to her issue upon any other marriage. A. refused to settle. Master of the Rolls decreed the articles to be perform'd within six months, or delivered up to be cancelled. On appeal Ld. Keeper held, that A. could not be compelled to settle without the portion; but that B. the son was bound to pay it, being a party to the articles, as well as bound by the wife's covenant while sole to pay 2600*l.* and decreed B. to make good the 1000*l.* 2 Vern. 448. Mich. 1703. Baskerville v. Baskerville and Gore.

Master of the Rolls said, he could decree only a proportionable settlement for the 1600*l.* or else for the 2600*l.* if paid within six months. Chan. Prec. 187. Hill. 1701. S. C.

3. A feme being possessed of 200*l.* her husband before marriage covenanted to join so much to her 200*l.* as would purchase 30*l.* a year, to be settled on them two and the heirs of their bodies, remainder to the husband in fee. And until the settlement made, the 200*l.*

[It seems by the application of this case, and the remark on

it by the counsel that cited it (viz.) that this case not only fully proves the right of the heir, but likewise that he shall not lose that right thro' any accidents preventing the

execution of agreements within the time prefix'd that a time was limited for making the purchase, and also that the husband was dead at the time of the bill filed by the daughter, tho' the same be not so stated.]

to be taken as part of her separate estate ; and if no settlement be made during the husband's life, and she should survive, then to remain to her ; but if he survived, then to go to her brothers and sisters. The marriage took effect in 1688. They had issue a daughter. In 1711, the wife died living the husband, no purchase having been made. The daughter brought a bill against her mother's brother and sister, and the money was decreed to her, tho' it had not been laid out within the time provided by the articles, the Court looking upon the purchase as compleated. Cited Arg. Sel. Chan. Cases in Ld. Talbot's time, 83. as decreed 13 July 1713. *Kentish v. Newman.*

[281] (T) Agreements decreed. How. *Where there is a Waiver of a former Agreement.*

1. **A** Marriage agreement was *under hand and seal*, whereby the woman's debts which were 300 *l.* were to be paid by the intended husband, and she was to have the power to dispose of 200 *l.* by will ; and she agreed to *settle her estate* (being a lease for three lives) *on the man and his heirs, in case she died without issue.* But afterwards, *before the marriage, she refused to marry unless the deed was delivered back.* Whereupon a writing was delivered back, but not the settlement, and the husband told the person that the woman should have any thing so she would marry him. They marry'd, and the wife died without issue. Upon this *waiver of the agreement*, tho' the deed was not cancelled, the estate was decreed to the heir at law of the wife against the husband. 2 Chan. Cases 40. Hill. 32 & 33 Car. 2. *Balch. v. Tucker.*

(U) Agreements unperform'd. *What shall be said a Satisfaction.*

1. **A.** On the marriage of B. his son with M. settled some lands, and covenanted to purchase and settle other lands of the value of 50 *l.* a year to the use of B. for life, remainder to M. for life, remainder to the heirs male of the body of B. — A. died, leaving a considerable personal estate, and made B. executor (the 50 *l.* a year lands not being purchased.) B. levied a fine, and thereby barred the entail of the settled lands. M. died leaving issue C. a son, and afterwards B. married N. a second wife, by whom he had issue D. a son, and B. devised his estate to D. and made N. executrix, and gave C. 200 *l.* a year annuity for life on condition

condition to release his executrix of all demands. C. brought a bill against N. praying satisfaction of the covenant, or that he might sue it in the trustees names. But it was insisted, that this was a *covenant broken in the time of B.* who was thereby intitled to the damages thereon, and that C's bill was, that *B. as executor had retained a satisfaction for the non-performance out of A's personal estate.* And because B. as tenant in tail (had the settlement been actually made) might have barred the estate the next day, Ld. Chancellor dismissed that part of the bill. Mich. 1687. Vern. 480. Cann (Sir William) v. Cann.

2. Articles on marriage to make such a settlement on the wife was decreed after the husband's death to be performed, tho' the *husband made a better provision* for her than if he had perform'd the covenants in the marriage indenture. Fin. R. 388. Tr. 30 Car. 2. Marlow v. Maxie, Chaplin & al.

3. A. on marriage covenants *to purchase and settle lands of 200l. per ann:* on his wife for a jointure, and to the first &c. sons in tail: He *purchases, but does not settle,* and he dying, the lands descend to the son: Son brings bill for performance. Per Ld. Cowper; the lands descended ought to be deemed a *satisfaction of the covenant,* and decreed accordingly. 2 Vern. 558. Tr. 1706. Wilcocks and Wilcocks.

4. A. covenants *to leave his wife 650l.* A. dies intestate leaving 2000l. personal estate; per Master of the Rolls, she is well satisfy'd her 650l. by having a *moiety of the 2000l.* by the statute of distributions, and she shall not come in first as a creditor for 650l. and also for a moiety of the surplus. 2 Vern; 709. Hill. 1715. Blandy v. Widmore.

5. A. on marriage with B. covenants in consideration of marriage, and of his affection to his intended wife, * *within two years to convey* to trustees and their heirs as counsel shall advise, all his lands, *to the use of himself for life without impeachment of waste, then to his wife for life; and after her decease, to the use of the heirs male of the said A. on the body of the said wife to be begotten, and to the heirs male of such heirs male* lawfully issuing, remainder to the right heirs of A. and in the mean time covenanted to stand seised of the premises to such uses as are therein before declared. They had several sons and daughters, and afterwards A. levy'd a fine of the premises to bar the eldest son. A. and his wife both died, no further settlement was made pursuant to the marriage articles. Decreed that the eldest son was not barred by the fine, and that the articles should be carry'd into execution, and the covenant to stand seised was not a final settlement, and that A. was to be only tenant for life as appears by the words (without impeachment of waste) and the limitation (to the heirs male of such heirs male); and that tho' a much greater estate descended to the eldest son as heir at law, it should not be deemed a *satisfaction.* 9 Mod. 161. 1719. In Dom. Proc. Trevor v. Trevor.

6. On a treaty of marriage the father agreed to give his daughter 3000l. but before the marriage the father died leaving
A a 2 a will

S. C. cited
Arg. 2.
Wms's Rep.
615.—1
Wms's Rep.
325. Arg.
—2 Vern.
710. Arg. in
Case of
Blandy v.
Widmore.

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Abr. Equ.
Cases 391.
S. C.—At
the request
of his trus-
tees. Gilb.
Law of Uses
314. S. C.
—And the
trustees died
without
making any
request.
Ibid. 315.—
S. C. Wms's
Rep. 622.
to 634.
Pasch. 1720.
in Canc.
and was
afterwards
affirmed in
the House of
Lords.

a will and 2000*l.* legacy to his daughter. Afterwards they marry. The husband receives the 2000*l.* legacy. He cannot oblige the executor to pay the other 1000*l.* as upon the marriage agreement after he has accepted of the 2000*l.* as a legacy, but should rather have sued for the 3000*l.* on the agreement. 9 Mod. 3. Pasch. 8 Geo. 1. Ayloff v. Tracy.

Ibid. in a note there is said, that this decree was affirmed on appeal to the Lord Chancellor. 1732.

7. A man on marriage gave a bond either to settle 100*l.* a year within four months on his wife for life, or that his heirs, executors &c. should pay her 2000*l.* in four months after his death. He made his will, and devised lands of 88*l.* a year to his loving wife and her heirs, and died within four months after the marriage. But the Master of the Rolls held, that as money and land are things of a different nature, the one shall not be taken in satisfaction of the other. And he took notice of the words (loving wife) which are words of affection; and said, as to the husband's election to make such settlement within four months, but dying within the time, tho' it expired afterwards, yet where on death of testator matters are for some time in confusion, nothing is more usual than for the Court to enlarge the time, or to relieve against any lapse thereof; and therefore decreed the executors to pay the incurring profits of the 100*l.* a year from the death of the husband, and settle upon her the 100*l.* a year, they not being bound to pay the 2000*l.* to her; but the 88*l.* a year devised shall not be taken as part of the 100*l.* a year agreed to be settled. 2 Wms's Rep. 613. 616. 617. Trin. 1731. Eastwood v. Vinke and Styles.

(W) Agreements unperformed. Decreed, upon what Evidence, upon 29 Car. 2. 3.

1. *Proposals in writing* being sent to the friends of the woman by an uncle of the man's, tho' no answer was return'd, yet the man being admitted to be a suitor, and the marriage ensuing, this in equity was held to amount to an agreement executed, and ought to be performed on all sides. Fin. R. 146. Mich. 26 Car. 2. Parker v. Serjeant.

Case on a parol promise in consideration of marriage to pay in his

2. 29 Car. 2. cap. 3. s. 4. enacts, That from and after the 24 June 1677, no action shall be brought to charge the defendant on any agreement or consideration of marriage, unless such agreement, [283] or some note thereof, be in writing, and sign'd by the party to be charged or some other by him authoris'd.

life-time, or leave at his death 2000*l.* after which promise, and before the testator's death the statute of frauds was made. Per Cur. the statute extends not to this promise, but only to such as should be made for the future, and it would be very mischievous to annul all promises made by parol before that time. 2 Show. 16. Trin. 30 Car. 2. B. R. Helmore and Shuter.—Vent. 331. Gilmore v. Shuter S. C.—2 Jo. 108. S. C.—2 Lev. 227.

A. wrote a letter signifying his assent to the marriage of his daughter with J. S. and that he would give her 1000*l.* and afterwards by another letter upon a further treaty he went back from the proposals of his letter, and at some time after declared he would agree to what was proposed in his first letter. This was held a sufficient promise in writing within the 29 Car. 2. of frauds and perjuries, and that the last declaration had set the terms in the first letter up again. 2 Vent. 361. Mich. 35 Car. 2. Bird v. Blossie.—Skin. 142. Mich. 35 Car. 2. Anon. seems to be S. C.

3. On

3. On a treaty of marriage the father of the woman *agrees by letter to a third person*, to give so much with his daughter in marriage; this is binding and out of the statute of frauds. Vern. 110. Mich. 1682. 201. Mich. 1683. Moor v. Hart.

2 Chan. R. 284. S. C. -- cited Arg. Ch. Prec. 380. as affirmed in

Dom. Proc. — But where there were *after treaties* and proposals, and the parties differing, the agreement broke off. The Court inclin'd to dismiss the bill. 2 Vern. 34. Hill. 1688. Coke v. Mascall—Hill. 1690. the same cause came on again, when it appear'd that the agreement had been reduc'd to writing, and was read to the parties, and that defendant proposed to meet another time to execute, tho' it never was done, but that defendant forwarded the match, and * assisted in it; and the plaintiff offering to perform the agreement on his part, decreed per commissioners, that the agreement be perform'd as it was drawn. 2 Vern. 200. Coke v. Mascall. — * S. P. in Case of BAWDEN v. AMHURST. Ch. Prec. 401. Pasch. 1715. and S. C. cited there.

4. Letters did pass between A. and B. concerning the marriage of A.'s son with B.'s daughter; in one of the *letters B. promised if A. would marry his son to B.'s daughter, to give with her to A.'s son 1500 l. worth of land*, which A. utterly refused, and *wrote that he would no further trouble him about that affair till he was in a condition to give 1500 l. in ready money. Afterwards B. by letter offered to make his daughter worth 1500 l. in present money, and to give her 500 l. more at his death, if she please him, and promises by word of mouth that he will do it.* A.'s son marries the daughter, and brings a bill against B. for the money; and the question was, whether this was within the statute of frauds and perjuries; for it was objected, that the letters were *by way of proposal*, and that the *treaty was at an end* by A.'s saying that he would trouble himself no more &c. But Ld. North decreed it a good promise within the statute. Skin. 142. Mich. 35 Car. 2. Anon.

5. A. *by letter* under his hand promised 1000 l. with his niece, but in the same letter dissuaded her from marrying with the plaintiff, yet was afterwards present at the marriage and gave her in marriage. The Court would not decree the payment of the 1000 l. but left the plaintiff to *recover it at law if he could*. 2 Vern. 202. Hill. 1690. Douglass v. Vincent.

6. A. upon his intended marriage with B. who had lands in fee, and monies out upon securities, in consideration of the said marriage and portion agreed to settle *certain lands* for a jointure, and gave a *bond for performance* with a special condition reciting this agreement. They intermarried and A. dy'd without making the jointure, but during his life enjoy'd B.'s land, and altered the securities to himself. No agreement appeared besides the bond. Somers C. held, that this bond is a sufficient evidence of such agreement in writing, and decreed the settlement to be made accordingly, and if defendant refused to do it within 6 weeks, then he should pay costs. N. Ch. R. 207. Pasch. 1692. Holtham v. Ryland.

Abr. Equ. Cases 18. S. C.

7. A. *by letter* writ by his direction said he would give 1500 l. portion with his daughter.—A. was privy to the marriage after had, and seem'd to approve thereof. Daughter dies, baron administrators.—A. was decreed to pay the 1500 l. as his daughter's

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S. C. cited
per Ld.
Cowper Ch.
Prec. 440.

portion in marriage with the plaintiff, and this decree affirmed in Dom. Proc. 2 Vern. 322. Mich. 1694. Wankford v. Fotherly.

8. On a treaty of marriage between A. and B.'s daughter an *agreement in writing* was made and sign'd by A. and delivered to B. to be sign'd by him, but not done; and his objections not being to any material part of the agreement, but *permitting the courtship*, and the marriage taking effect, and not declaring his dislike till ask'd for payment of the portion, and permitting the young couple to live with him the Master of the Rolls decreed the agreement and payment of the portion. 2 Vern. 373. Hill. 1699. Halfpenny v. Ballet.

9. The defendant's son made his addressees to the plaintiff's daughter, and the plaintiff desiring to know what the father could settle on him, he told him that his father had an estate of 60 l. per annum, that he was in a good trade and would take him in partner; and said he would satisfy him more particularly by going to his father, who lived at some distance off; and accordingly went, and on his return told him, that he would settle the estate on him, and take him in partner; upon which the plaintiff agreed to settle a leasehold estate on him of 2 or 300 l. per annum, but desired the son to acquaint his father of it by letter, who did, and the father in his answer expressed his good-liking of the match, and said, he would comply with every thing he told his son. On the marriage day the woman fell sick of the small-pox, and the same day the son went to his father's, where he fell sick likewise of the small-pox, but in his sickness was prevailed on to make a will, and devise the leasehold estate to his father, and died; the wife recovering, her father and she pray a reconveyance of the leasehold estate, or that the agreement might be performed in specie, and a discovery of the letter wrote by the son, and insisted that the letter and answer brought the agreement out of the statute of frauds; but the defendant denying that he knew the contents of the letter, tho' he owned he received such a one, and that he had burnt it as waste paper, my Ld. Chancellor (tho' he said it was a case of great compassion) doubted whether he could relieve the plaintiffs, saying, it was only executed according to the statute by one party, and what the defendant told his son might be very uncertain, who perhaps might have magnified matters in order to inhance his father in law's good esteem of him; but he gave the parties time to see if they could agree the matter. Abr. Equ. Cases 20. pl. 7. Hill. 1710. Hall v. Butler.

Ch. Prec.
402. S. C.

10. The father of the woman and the intended husband made proposals of portion and settlement, and minutes were taken down by the counsel, who presently gave them to his clerk to draw a settlement accordingly. Next day the father fell sick and dy'd suddenly after. The marriage was consummated the next morning. On a bill for a specifick performance, Ld. Chancellor held it within the statute of frauds, and said he knew no case where an agreement, tho' wrote by the party himself, should bind, if not sign'd or in part executed by him, and that those preparatory heads

heads might have received several alterations or additions, or the agreement might have been entirely broken off, upon some further inquiry as to the persons circumstances. And the whole Bar agreed to it, and also, that if the marriage had been upon the foot of this writing, and the father had been privy and consenting to it, that he should afterwards have been obliged to execute his part thereof. Pasch. 1715. Abr. Equ. Cases 21. *Bawdes v. Amherst.*

11. A. upon his marriage with M. promised, that she should enjoy all her own estate to her separate use, and agreed to execute writings to that purpose, and instructed counsel to draw them; but at the time of marriage, the writings not being perfected, A. desired this might be no delay, and engaged upon his honour, she should have the same advantage as if in writing and executed. After the marriage M. wrote to A. upon this, and A. in answer wrote, that he was always willing she should enjoy it, and that it should be at her command. A. pleaded the statute of frauds. To which it was answered, that this was executed by the inter-marriage, and that the letter after marriage was evidence of the agreement, and so brought it out of the statute. But it was replied, that it was wrong to call the marriage an execution of the promise, when till the marriage it was not within the statute, which makes the promise in consideration of marriage void, and so it would be quite frustrating the statute; which the Court approved. And *Ld. C. Parker* said, that in cases of fraud equity will relieve even against the words of the statute, that the expressions in the letter were general, but had it recited or mentioned the former agreement, and performance thereof, it had been material; but as this case is circumstanced, his Lordship allowed the plea. Pasch. 1720. *Wms's Rep.* 618. *Montague (Viscountess) v. Sir Geo. Maxwell.* [285]

12. A letter from the father to his daughter intimated that he had agreed to give the plaintiff her intended husband 3000*l.* portion; but before the marriage the father died, and a legacy of 2000*l.* long time before the treaty of marriage bequeathed by the father's will was paid to the husband, and accepted by him as the portion with his wife, she never having shewn him the said letter, nor had any settlement made her. The husband not being supposed to have married in confidence of the letter, which he knew nothing of before. *Ld. C. Parker* dismiss'd his bill. Trin. 1722. 2 *Wms's Rep.* 165. *Ayliffe v. Tracy.*

(X) Agreements decreed. How; as to the Limitations &c. to be made upon. See Settlement (A)

1. A. Before marriage covenants in consideration of that and 2000*l.* portion to settle all his freehold estate on himself and wife for a jointure, remainder to the first &c. sons in tail, remainder

remainder to the daughters in tail, remainder to himself in fee, *with power of revocation by the wife's father*. A. died without making any settlement, leaving his wife and no son, but 2 daughters. He by will gives 2000*l.* to the daughters, and if either died before 21 or marriage, the survivor to have the whole, and *devised all his lands to his wife in fee*, and gives the surplus of his personal estate to her, and makes her executrix. It was decreed that a settlement be made with power of revocation by the wife's father, but would not decree the *legacies to be a satisfaction* of the settlement, but that the same should be put out subject to the contingencies in the will, per Ld. Wright Ch. Prec. 175. Mich. 1701. Jaggard v. Jaggard.

2. A marriage contract was made *in France between two French people* as to wife's portion, how it should go in case of the husband's surviving, by which part was to go according to the custom of Paris, and a certain sum in a different manner. The agreement was decreed, per Ld. Wright, as to the sum stipulated only, but on appeal to the Lords, the whole contract was decreed. Ch. Prec. 207. Mich. 1702. Feaubert v. Turst.

Ch. Prec.
422. Mich.
1715. per
Cowper C.
Arg.—Per
Parker C.
10 Mod.
437. Trin.
5 Geo. 1.

3. If marriage articles are for settlement of an estate *on the husband and the heirs male of his body*, yet when they come into this Court for a specifick execution, the Court models the settlement so as to make it effectual, and will give the husband but an estate for life; per Cowper C. Ch. Prec. 448. Mich. 1716. Arg.

in Trevor's Case.—S. P. admitted per Cowper C. Pasch. 1711. 2 Vern. 671. in Case of Baile v. Coleman.

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4. If the marriage articles are for a settlement to be to the husband for life, and to the wife for life, and then *to the first and other sons and the heirs male* of their bodies &c. Chancery would *decree a limitation to trustees to preserve the remainders*; or if by fine or otherwise they are *destroy'd* before they take place, this Court would set them up again. And if a *defective settlement* in any particular had been made, *a second must be made* till the uses therein are well and truly raised, and till then the covenant subsists; per Ld. Chanc. Abr. Equ. Cases 391. Trin. 1719. Trevor v. Trevor.

See Settlement.

(Y) Agreements decreed. How; upon Limitations contained in the Covenant.

A like decree was made in the House of Lords, as cited per the Attorney-General,

1. [IF a bill be brought to carry marriage articles into execution in the life-time of all the parties, and in the articles is a covenant to levy a fine *the use of A. the husband for life*, remainder to the use of *M. the intended wife for life*, remainder to the *heirs males of A.* remainder to A.'s right heirs. Chancery would decree the limitation to be *to the first son, and the heirs males*

males of his body &c. remainder to daughters and the heirs of their bodies, remainder to the heirs of the body of A. Per *Ld. Cowper* Ch. Prec. 428. Mich. 1715. *White v. Thornborough.*

and agreed per *Ld. Cowper* Ch. Prec. 422. — *S. P.*

cited per *Ld. Cowper.* Mich. 1716. Ch. Prec. 448. in *Case of Brown v. Barkham.*

2. A. gave 1500*l.* portion in marriage to B. with M. his daughter, and it was agreed by articles to which A. was party, that the 1500*l.* and 1000*l.* of B.'s should be vested in a purchase of land within one year after the marriage, and be settled to the use of B. for life, remainder to M. for life, remainder to the first &c. sons of the marriage successively in tail male, remainder to trustees for 1000 years to raise portions for daughters, if no son, viz. if but one daughter 1000*l.* &c. Proviso, that if before the money laid out in the purchase B. and M. or either of them should die leaving issue only one daughter, then that daughter should have the whole 2500*l.* And farther covenanted, that if M. died before him, he would leave after his death to the issue of the marriage 1500*l.* more than what was settled. M. died leaving E. a daughter only, who after by corruption of a servant married J. S. a person of no estate (without B.'s consent), and who within a year became a bankrupt. B. made no purchase within the year, and now brought his bill for relief against the lapse, and that E. might have no more than if the purchase had been made in M.'s lifetime. And by consent of A. a decree was made accordingly, without giving E. (still an infant) day to shew cause. Afterwards J. S. and E. brought a bill to set aside this decree, and to claim the whole 2500*l.* But *Ld. C. Macclesfield* refused to do so, and ordered, that (B. being dead) the 1500*l.* and interest since B.'s death should be brought before the Master, and the interest thereof be applied for maintenance of E. and her child, with liberty to her or child to apply if J. S. should die. Mich. 1721. *Wms's Rep.* 734. *Richmond v. Tayleur.*

3. Marriage articles were enter'd into for settling lands to the use of B. the husband for life without waft, remainder to M. the wife for life, remainder to the heirs male of the body of B. by M. remainder to the heirs of the body of B. by any other wife, remainder to the heirs female of the body of B. by the said M. remainder over; with power to B. to make leases for 3 lives, and to make a jointure.— Afterwards and before the marriage a settlement was made and mentioned to be in pursuance and performance of the articles, and thereby the lands were limited to B. for life without waft, and with power to make leases, remainder to the first &c. son of the marriage in tail male, remainder to the first &c. son of B. by any other wife in tail male successively, remainder to the heirs of the body of the said B. by the said M. remainder over. There were no trustees for supporting contingent remainders. They had issue only one daughter, who died leaving 2 daughters. B. having an estate tail, by virtue of this limitation suffered a recovery, and sold part of the lands and devised the residue, and died.

See (E. a) *S. C.* cited in *Case of Legg v. Goldwire.* — This case was cited in the *Exchequer.* Trin. 1729. 2 *Wms's Rep.* 539, 540. in the *Case of Powell v. Price,* and said theretohave been reversed in the House [287] of Lords.

But the Court said, that if there should be any difference between that and the principal case, there might be reason to lay hold of it; and that there was this *diversity*, viz. that in the Case of *WEST v. ERRISSEY*, no portion was provided for the daughters of the first marriage, whereas in the Case of *POWELL v. PRICE* portions were secured

in all events to such daughters. And in *WEST* and *ERRISSEY*'s Case after the limitation in the articles to the heirs male of the body of the husband and wife with remainders to the heirs male of the body of the husband by any wife came the remainder to the heirs female of the body of the husband by the first wife &c. so that the daughters were more immediately in view and contemplation of the parties than in the Case of *POWELL* and *PRICE*, in which case the limitations were, after the heirs male of the body of the husband by the first marriage, remainder to the heirs male of the body of the husband by any other wife, remainder to the heirs of the body of the husband, with a clause that if the husband should die, leaving only daughters by the first wife, then such daughters should have 4000*l.* secured to them on the same part of the estate; and after the first wife died, leaving issue only one daughter. The husband married a second wife and settled the estate in tail male &c. and died, leaving sons by such second wife, and it was decreed, that the daughter of the first marriage was not intitled by the limitation in the first marriage articles to the heirs of the body of the husband to the lands in question.

died. The granddaughters brought a bill in the Exchequer against the executors of B. to rectify the mistake in the settlement in limiting an estate tail to B. instead of limiting it in strict settlement as by the articles ought to have been done. The articles were made in December 1685. The settlement in March 1685. The sale of the lands in 1698; and the will in December 1722. The defendant pleaded the settlement of 1685, the common recovery, the will of B. and the *long enjoyment*, but the same was over-ruled by Ld. Ch. B. Gilbert, and the other barons unanimously. But after, on hearing the cause, Ld. Ch. B. Pengelly and the Barons dismissed the bill, but without costs, Decemb. 1726. But on appeal to the Lords this dismissal was reversed, Feb. 1727, and the premises not sold were decreed to be convey'd to the granddaughters and the heirs female of their bodies as tenants in common with cross remainders to them in tail female, and the devisee to account for the profits, and the executor to account for the purchase money received by B. for the lands by him sold, and to pay interest for the same, and the writings to be brought into the Court of Exchequer, and possession to be delivered to the appellants; but the principal monies arising by the said sale, to be laid out in lands to be settled to the same uses, as the lands unsold were decreed to be conveyed. 2 Wms's Rep. 349. to 356. Trin. 1726. *West v. Errissey*.

(Z) Settlements. Construction. How much.

1. *A.* Covenants that lands settled for a jointure are 400*l.* per annum. This has relation to the time of the settlement, and not to the death of A. Per Ld. North, Vern. 217. Hill. 1683. *Speke v. Speke*.

2. Lands on marriage were conveyed on trust that after the death of the husband the wife should receive the rents of the lands as they were then let. The husband made leases at an advanced rent; the advanced rents shall go to the heir at law, 9 Mod. 32. Trin. 9 Geo. 1. *Lawly v. Lawly*,

(A. a) Promises. Construction. How much.

1. *Infant* upon his marriage *promises* to make a settlement when he comes of age on his wife and her issue. This was agreed to be a *good consideration* to avoid a charge of *fraud*, tho' infants are not bound in law to perform such promises. 2 Lev. 147. Mich. 27 Car. 2. B. R. Lavender v. Blackstone.

2. Twisden J. said, it had been adjudged, that if a man promise to give *half his estate* to his daughter in marriage, that the lands as well as the goods are included. 3 Mod. 46. Trin, 32 Car. 2. B. R. in Case of Reeves v. Winnington. [288]

(B. a) Lien. Where the Covenant is a Lien on the Land.

1. J. S. in consideration of the marriage of M. his *niece* with A. and of a settlement on M. by A. agrees by *deed poll* to permit all his lands in W. and Lancashire to descend to his niece if he died without issue, with power to charge the same with 500l. and no more.—He devised away 2000l. and part of the lands in W. and Lancashire were *intailed* by an ancestor of the uncle. Decreed the agreement to bind all the lands but those intail'd and chargeable only with 500l. Fin. R. 405. Hill. 31 Car. 2. Orway v. Braithwaite and Sandys. A conveyance to another set aside where he had notice of such agreement made by his father on his daughter's marriage. Ibid. 449. Trin. 32 Car. 2. Brown v. Stebbing.

2. A. purchased lands held in *borough English*, and having two sons, B. the eldest, and C. the youngest, gave the lands to B. which otherwise had descended to C.—B. on marriage with M. *covenanted* before the marriage to convey &c. the lands in trust for B. and M. for their lives, and to the heirs of their two bodies, *remainder to the heirs of the survivor*. B. died without issue. Decreed the heir of C. to perform the covenant. Fin. R. 374. Trin. 30 Car. 2. Ironmonger v. Ironmonger.

3. A. on B.'s marriage with M. settles land on M. for a *jointure*, and in the settlement A. covenants that the lands were 800l. *per annum*, and if they fell short his other estate should be liable to supply the defect.—A. mortgaged his other estate, and was otherwise indebted, and by will charg'd the other lands with payment of his debts; and decreed according to the will without regard to the covenant for making good the jointure. Vern. 63. Mich. 1682, Girling v. Lee. But where A. covenanted to settle 800l. per annum, and named no lands in particular, it was held, that the lands were bound, and that even against a purchaser, and that if he had afterwards acknowledged any statute or judgment, yet this covenant should be looked upon as a prior incumbrance, and was so decreed. Arg. Vern. 64. in Case of Girling v. Lee.

4. A. on a treaty of marriage with M. his daughter to B. promises to give B. 1500*l.* in land, either at D. or E. or the same sum in money out of the monies to be raised by sale of D. or E. Decreed per North K. that A. pay B. the 1500*l.* and that the lands at D. and E. should stand charged with the payment of it, and that B. should settle 300*l.* per annum on M. Vern. 201. Mich. 1683. Moor v. Hart.

9 Mod. 16. S. P. cited in Lady Coventry's Case.—Where the power in a like case was no farther executed than by a deed

5. A. tenant in tail (with power to make a jointure) in consideration of marriage and 3000*l.* articles to make a jointure, and dies without issue, and without making the jointure; the wife dies, and her executrix brings a bill for an account of the profits of the land articulated to be settled. Jefferies C. dismissed the bill, and said there was great difference between a defective execution of a power, and where the power was not executed at all. Mich. 1686. Vern. 406. Elliot v. Hele.

drawn and ingrossed, and the particulars inserted, it was decreed, that the articles were a lien, and that the wife should have the very lands in the deed mentioned settled upon her. Mich. 9 Geo. 9. Mod. 20. Lady Coventry's Case.—But had it not been for the articles, the statute of frauds would have stood in the way against the draught. Ibid. 19.

[289] 6. A. on his marriage with B. agreed and gave bonds to settle particular lands on the wife and the issue of the marriage, and afterwards aliened part of those lands. A. dies. Finch C. decreed the jointress to have the deficiency of her jointure made good out of the inheritance of the lands remaining unsold. But Jeffries C. reversed that decree; for the jointress and children are equally purchasers, and they must bear the loss in proportion. Vern. 440. Hill. 1686. Carpenter v. Carpenter.

7. A. upon his marriage with M. covenanted to settle his lands in R. and also lands that should be of the value of 60*l.* a year upon M. for life. Afterwards A. by will charges all his real and personal estate with payment of his debts, and died indebted. Ld. C. Parker held the marriage articles to be a specific lien as to the lands in R. and that A. was only a trustee, and that those lands are not to be affected by any of the bond debts during M.'s life. But as to the lands of 60*l.* a year, M. is to come in only as a specialty-creditor with the others, and the Master to value her estate for life at so many years purchase, and then she to come in as a creditor for so much money. But there being two years arrears of the 60*l.* a year due at the hearing of the cause his Lordship ordered, that she come in as a creditor for those two years besides the value of her estate for life, that being a debt actually due to her, and must be paid, she having run the hazard of her life in the mean time, which had it dropped, there must have been no valuation. Wms's Rep. 429. Pasch. 1718. Freemoult v. Dedire.—And it was said to have been so ruled in Ld. Harcourt's time, in one Berisford's Case.

It was decreed to be made up 1000*l.* per

8. A. had power to limit a jointure of 1000*l.* a year, and covenants to settle 1000*l.* per annum upon marriage. The conveyance is made according to a particular that was supposed to be of that value,

value, but proved only 600l. per annum. Upon a bill against the remainder-man to have the jointure compleated it was decreed per Ld. Wright accordingly. Arg. Pasch. 8 Geo. 1. 10 Mod. 479. cites Ld. Clifford v. Earl of Burlington.

annum, against the issue in tail, though not privy to the marriage

treaty, or guilty of any fraud. Trin. 1700. 2 Vern. 379. S. C.—G. Equ. R. 167. S. C. cited.—S. C. cited Arg. 2 Wms's Rep. 229. in Case of Lady Coventry v. Ld. Coventry.—S. C. cited by the Master of the Rolls. Hill. 1731. 2 Wms's Rep. 600. in Case of Evelyn v. Evelyn; and says that this decree was against the issue in tail, and so relief was given to a purchaser against a purchaser, but that this however is to be looked upon as a *family case*, where it might be thought severe not to make good a jointure to a lady who brought a considerable fortune, and the decree made *probably on a faint defence*; besides, it does not appear to have been thought a right decree, or even sufficiently approved of by the Reporter himself, at least it is to be considered that there was a covenant, and also an intention to execute it, and cited 2 Vern. 379.

9. A. had power to settle lands of 500l. a year for a jointure on a wife, and on his marriage with M. he *covenanted that he would, pursuant to the power given him by the family settlement or otherwise, settle lands of 500l. a year*, but died without doing it. It was contended that M. ought to resort to the personal estate, there being *no particular lands* covenanted to be settled, and the covenant was to settle lands of 500l. a year pursuant to the covenant *or otherwise*; cited by the Master of the Rolls as the Case of LADY COVENTRY v. LORD COVENTRY, and that it was decreed by Ld. C. Macclesfield assisted by the judges, that this covenant bound the land, and that the words (or otherwise) were intended in favour of the jointress for her further security in case the power should fail or prove deficient; and if so, they were not to be made use of to her prejudice. 2 Wms's Rep. 438. Hill. 1727. in Case of Edwards v. Freeman.

10. A. on his marriage *covenants to levy a fine of his freehold, and to surrender his copyhold to the use of himself and his wife for their lives, remainder to the heirs male of their bodies, remainder to the heirs of their bodies*, remainder to his own right heirs. A. dies leaving a son and a daughter before any fine levied or surrender made. The son borrows money of B. and for security

G. Equ. R. 107. S. C. Ch. Prec. 425. S. C.

covenants to levy a fine and surrender to B. and his heirs, and declare the uses, and dies without issue. Decreed by Harcourt C. that the settlement might be in a stricter manner than barely in the words of the deed, when the deed (which he looked upon in the nature of articles) was to be carried into execution in a Court of Equity, and that a remainder might be expressly limited to the daughters of the marriage so as a fine by the son could not bar it, and decreed both freehold and copyhold to the daughter. But on rehearing Cowper C. declared, the *deed is to be considered* not as articles, but as a *defective settlement*, and the uses not to be altered or varied, and that a Court of Equity will look upon it as if a fine had been levied, and then the daughter could not have been barred without a fine, and she is to be considered as heir of the body of her father, and the *limitation* in the deed (*to the heirs of their bodies*) could be inserted for no other purpose but to *carry the estate to the daughters of the marriage*,

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marriage, it being before limited to the heirs male, and therefore confirmed the decree as to the freehold; but there being no custom within the manor for suffering a recovery, a surrender would have barred the copyhold if it had been settled, and so varied the decree, and dismissed the bill as to the copyhold. Mich. 1715. 2 Vern. 702. *White v. Thornburgh*:

11. *A. tenant for life, with power to make a jointure of 100l. a year for every 1000l. which any wife should bring as a marriage portion. The jointure to be for the wife's life, and to take effect from the death of the husband. A. on his marriage with M. with whom he was to receive 8000l. portion, covenanted to settle 800l. a year within a month after the marriage, and also to make an additional jointure of 100l. a year for every 1000l. he should receive, or be intitled to by virtue of M.'s father's or mother's will, and so in proportion for any less sum than 1000l. The 800l. a year was settled, and 150l. a year more for 1500l. more received by A. And if A. had received any further sum for which he had made no jointure, the remainder-man after A.'s death is compellable to make a proportionable jointure. But where a further portion is uncertain, and depends upon a contingency at the death of A. so as in truth no further portion is brought to A. Ld. C. King thought M. not intitled to any further jointure, nor the creditors of A. to such further contingent portion in case the same should be afterwards recovered; and decreed, that she keep such overplus to herself, without any additional jointure, the remainder-man not being bound or affected by A.'s covenant for making a jointure any further than the original power warrants, which was to settle 100l. a year for every 1000l. which any wife should bring to her husband. 2 Wms's Rep. (648) Mich. 1731. *Holt v. Holt*.*

(C. a) Covenants. Lien. On the Personal Estate.

1. **A.** On marriage of B. his son with M. who brought a considerable portion, agreed to settle and assign to B. all his estate and interest in such lands, and to leave him all such goods of which he should be possessed at the time of his death. A. died, and by will bequeathed 30l. to J. S. his daughter; J. S. sues for the legacy, and alleges assets, besides what is claimed by the articles. An account was decreed of A.'s estate not included in the articles, and if B. had assets then to pay the legacy. Fin. R. 125. Mich. 26 Car. 2. *Mablety v. Baker*.

2 Ch. Rep.
92. 25 Car.
2. S. C.

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2. A. on the marriage of B. his daughter and heir with C. agrees to pay 500l. at Christmas, and to convey to C. and his heirs a house in H. and at his death to give his daughter all his real and personal estate whatsoever, except 50 or 100l. and articles for performance. Afterwards A. devises away all his personal estate to J. S. Decreed that the executors, during the minority of

of J. S. be executors in trust for B. and C. except as to 1000l. for J. S. Fin. R. 183. Mich. 26 Car. 2. Harmore v. Brooke.

3. A. on marriage with M. by articles in consideration of 6000l. portion mentioned as received by him with M. an infant, covenanted with B. and C. trustees, that if he and his wife lived seven years, then in three months afterwards to lay out 10,000l. in a purchase, and settle it on himself for life, and on M. for a jointure &c. and if he died before a settlement made, to leave her 10,000l. and confessed a judgment to B. and C. for performance of covenants. 1500l. part of the 6000l. was laid out in purchasing an annuity in the Exchequer in the name of C. and he gave a declaration of trust to A. that his name was used in trust for A. his executors and administrators. J. S. lent A. 1000l. on his assigning the annuity and depositing the tallies and orders with him. J. S. brought a bill to compel C. to assign the trust for securing his 1000l. But on a cross bill M. insisted, that the annuity purchased in C.'s name was to be as a pledge till the marriage agreement performed, and that the tallies &c. were deposited in C.'s hands for that purpose, but that A. persuaded her to take them out of his hands as not safe there, and M. having so done, A. afterwards took them out of her cabinet, and delivered them to J. S. The counsel for J. S. insisted on the statute of frauds, and that a parol agreement could not be tacked to a written agreement. But Cowper C. dismissed the bill of J. S. and decreed the 100 l. a year to M. her husband being broke, and said that tho' parol agreements are bound by the statute, and that agreements are not to be *part parol and part in writing*, yet a *deposit or collateral security* is not within the purview of the statute; and said that M. who was married in her infancy, and her trustees who had made an improvident agreement in writing, did well afterwards upon recollection to get that deposit for performance of the agreement. 2 Vern. 617. Mich. 1708. Hales v. Vanderchem.

4. The father-in-law agrees to make up the fortune 4000l. of which 2500l. is paid on the marriage, and *four years afterwards enters into bond for the other 1500l.* without any application of the husband or wife, he being then very ill and dying of that illness soon after, but kept the bond himself, and which was found with his will after his death, but was shewn before to them with his will. Ld. Harcourt held that this bond could *not be tacked to the parol agreement* to make it evidence in writing of that agreement, or as a performance of it, because of the distance of time, and from the circumstances took it only as a legacy and voluntary against creditors. Ch. Prec. 370. Trin. 1713. Loeffes v. Lewen.

5. A. on his marriage with M. gave a note signifying his consent, that as to 200l. part of the wife's portion, the wife should have the same. It was held by the Master of the Rolls, that the 200l. was specifically bound thereby, so that, the husband afterwards becoming a bankrupt, the feme was relieved against the as-

signees as to this 200l. Wms's Rep. 458, 461. Trin. 1718. Bosvil v. Brander.

(D. a) *Portions to be paid, or Settlements to be made on Condition precedent:*

[292] 1. A. On marriage of M. his daughter to B. among other securities gave a *bond* to the father of B. to pay 1000l. *within seven years* after the marriage, and *after a jointure of 600l. per annum* should be settled on her. B. devises this 1000l. to J. S. who brings his bill, and suggests that a jointure of 600l. per annum was made, and that it was accepted by some subsequent agreement. Defendant *pleads*, that the father of B. died within seven years after the marriage and date of the bond, and had *not made a jointure* of 600l. per annum according to the condition of the said bond; that the 1000l. was *not payable but on a condition*, which condition was never performed; and as to the demand of the 1000l. and a discovery of assets demurred; for that if any thing be due they ought to sue the bond *at law*, and not first come here. Decreed, that as to so much of the *plea and demurrer* as relates to the agreement, and settlement, and acceptance of the jointure, so as to intitle the plaintiff to a duty and demand of the 1000l. in equity, the same should not be allowed. And as to so much as seeks a discovery of assets and personal estate to satisfy the 1000l. the defendant's further answer was respited till the hearing of the cause. Fin. R. 178. Mich. 26 Car. 2. Glascock v. Brownwell.

On re-hearing
ing Ld.
North confirmed the
decree with
this variation, that A.
should either
* pay the
money, or
that the
complainant
should hold
the land absolutely for
his life.

Vern. 167.

Pasch. 1683.

Vermuden v. Read.—* *Quære* if it should not be (pay interest for the money at 50s. per cent. or that &c.), it being recited introductory to the decree, that the defendant had power to retain the 4000l. paying such interest.

Fin. R. 98.

Hill. 25

Car. 2.

Cheke v.

Ld. Life.

3. A. by marriage articles was to have 4000l. portion with M. his wife, viz. 1500l. paid in hand, and 2500l. more *if he made a settlement within three years*; M. died within two months after the marriage, the settlement not made. A. brought his bill

bill but was dismissed. Vern. 69. Mich. 1682. cited as the Case of Colonel Cheek v. Ld.

4. Upon a marriage of the plaintiff's son the father was *not* to make any settlement till the portion paid, which by the articles was to be done by a certain time; but the same not being done the Master of the Rolls would not decree the father to account for the rents, and take the portion with interest from that time, the portion being far short of the lands to be settled. Ch. Prec. 187. Hill. 1701. Baskervill v. Gore. 2 Vern. 448. Mich. 1703. S. C.

5. Where there were articles before marriage, by which the baron was to disincumber his estate within 6 months, (within which time she died) and for every 100l. to settle 10l. a year, tho' the estate was but 70l. a year, and the fortune secured on land was 1250l. yet Ld. Harcourt decreed the 1250l. (the husband and wife being dead) to the administrator of the husband, he being a purchaser by the agreement, and having made some progress in discharging the estate. Ch. Prec. 312. Pasch. 1711. Meredith v. Wynn.

6. A. gave B. a note of hand to pay B. 200l. within two years upon condition B. married M. A.'s daughter, and settled 600l. upon her for a jointure &c. The marriage took effect, and there was issue a daughter, but M. and daughter died before the two years expired, and before a settlement made. B. in a bill insisted he had been looking out for purchases to lay out the 600l. and was only prevented by the act of God. Defendant insisted it was a condition precedent, and if any damage was, he might have his action at law, and that the plaintiff was not bound to lay out the 600l. and therefore there were no mutual remedies. Per Cur. it was in B.'s power to have intitled himself to the 200l. when he pleased, by laying out the 600l. which not being done the bill was dismissed, but without costs. G. Equ. R. 188. Hill. 12 Geo. 1. Powel v. Pillet.

(E. a) Settlement. Variance between Agreements, [293] Articles, and Settlements.

1. **H**usband before marriage agreed to give security to settle 150l. per annum in jointure, remainder to the issue male; provided if no such issue, then besides her own lands (which were valued at 3000l.) to leave 2000l. for daughters, and for performance gave recognizance of 5000l. After marriage, by a new agreement, the lands of the wife were settled on husband and wife, and the heirs of the survivor; and the lands of the husband were, on default of issue M. settled on the daughters. They had issue only one daughter, and died. Decreed, that the daughter was to have in the whole 5000l. so that the mother's lands which descended to her being worth 3000l. she was to have 2000l. out of her father's estate; so that if the lands of inheritance settled by the father fell short of 2000l. more, it

should be made up out of a leasehold estate of the husband, and then the recognizance to be delivered up. Fin. R. 91. Hill. 25 Car. 2. Burges v. Burges.

2. Articles on marriage were for settling 300l. per annum, but the husband died before the settlement made, but in compassion to the family she *agreed when a widow to accept less*, viz. 100l. per annum; but afterwards she would have gone off from the agreement, but the Court decreed a performance. Fin. R. 128. Mich. 26 Car. 2. Norcliff v. Worsely.

3. A bond was made to trustees before marriage to settle lands, whereof the obligor was seised, *to them and their heirs* within two months. After the two months the baron, in consideration of the love which he bore to his wife, and other considerations, *covenanted with one of the trustees to stand seised* to the use of himself for life, and after to the wife for life, and after to the first and tenth sons, and their heirs male, and after *to his own right heirs*. They had a son, who died without issue; then the husband died without other issue. The wife died, leaving a son by another husband, who claimed as heir to his mother. But the defendant demurred, because the conveyance by covenant to stand seised ought to be intended a performance of the bond; that the plaintiff is a mere stranger to the baron; that the obligee and executors of the baron should have been made parties; and no title in equity appears in the bill. The demurrer was allowed; but the plaintiff to be at liberty to amend his bill, or bring a new bill on the said marriage agreement. 3 Ch. R. 50. Bagg v. Foster.

All parol agreements before marriage are resolved into the jointure settlement.

Per Ld. Jefferies. Vern. 369. Hill. 1685. Bellasis v. Benson.—See Skin. 158. Speke v. Pedley.

4. A marriage settlement is made in pursuance of articles, and there is a covenant in the articles, that the lands *are of such a yearly value*, but in the settlement it is *omitted*, yet the jointress may resort back to the covenant which is still subsisting; per Ld. North. Vern. 218. Hill. 1683. Speake v. Speake.

5. Marriage settlement imported to be in pursuance of an agreement. At the hearing there was strong proof by three or four witnesses that this deed was not drawn according to the agreement, but that the agreement was for settling lands of a far greater value, and to *other uses*. A trial was directed by Ld. Nottingham to try what was the agreement, and the deed to be left out of the case, and not given in evidence. On a bill of review Ld. North reversed the decree, saying, it was a strange order to take away a man's evidence, and then send him to law. Vern. 246. Trin. 1684. Bechinal v. Bechinal.

[294] 6. If a bond before marriage is *only for a jointure*, and the settlement goes farther, and entails the land upon the children of the marriage; as to the jointure the settlement may be good, and yet *fraudulent as to the remainder*, in respect of a purchaser; per Ld. North. Vern. 286. Hill. 36 & 37 Car. 2. in Case of Jason v. Jervis.

7. Mar-

7. Marriage articles were worded so as to convey an estate tail to the baron; but upon suggestion by the father, that an estate for life only was intended, and for that purpose a clause was therein to restrain wast, it was decreed, per Master of the Rolls, that an estate for life only should be conveyed. 2 Vern. 13. Mich. 1686. Griffith v. Buckle. See 2 Vern. 702. White v. Thornburgh—671. Baile v. Coleman.

8. Election reserved by marriage articles, that if a settlement was not made in the husband's life of 400*l.* per ann. the wife might have 3000*l.* in money, or 400*l.* per ann. for life, remainder to the issue &c. was set aside in favour of creditors, and the 400*l.* per ann. decreed to be settled, tho' the wife elected to have the 3000*l.* and so the children insisted to have the 400*l.* per ann. 2 Vern. 605. Hill. 1707. Hancock v. Hancock.

9. By marriage settlement the limitation of the remainder was to the heirs of their two bodies, and by the articles (after the estate for life to the husband) it was agreed to be to the wife for life, and then to the heirs of the body of the wife by the husband. The settlement is mentioned to be according to and in performance of the articles. But it not appearing that the parties intended to vary from the articles, and it seeming to be only an accident, and it appearing by proof that a strict settlement was intended, and the articles agreeing with the intentions of the persons, which the settlement does not, Cowper C. decreed the land to go according to the articles, tho' the settlement was made before marriage. 2 Vern. 658. Tr. 1710. Honour v. Honour. * Wms's Rep. 123. S. C. says, that the remainder in the settlement was to the heirs of the body of the husband on the body of the wife to be begotten. The wife died, leaving a son. The

father mortgaged the lands for 500*l.* having got the son, without any consideration, to join in a fine; and in the deed of uses the fee simple and equity of redemption were limited to the father. The son brought a bill to compel the father to re-settle the premises on the son after his death, and the settlement to be made agreeable to the articles; Ld. Cowper decreed the father and his second wife to join in a conveyance accordingly. But the son having join'd in the mortgage, the Court would not set that aside, but ordered the father to keep down the interest during his life; and because he insisted on taking advantage of this mistake, it was ordered that he make the conveyance at his own charge, and pay costs. Ibid. 123. to 125.

10. By marriage articles the eldest son was to be tenant in tail, proviso that the father might sell the lands by the consent of the trustees, and purchase other lands, and settle the same to the like uses. He sold those lands, and purchased other, but by the settlement of them, he made the eldest son only tenant for life, and held good, and that the eldest son, when he came into possession could not incumber those lands. 9 Mod. 128. Hill. 11 Geo. 1. Reeves v. Reeves. Ibid. 131. cites MATTHEW'S Case, where the settlement controlled the articles in the same point. And that where

by the articles he was to have power to settle 1000*l.* per ann. which by the settlement was made only 600*l.* he was bound down to the 600*l.* and was forced to get an act of parliament to enlarge it to 1000*l.* per ann. which he obtain'd; but it left his estate in possession, and all the remainders over to continue as by the settlement. Ibid.—Cites a like point.—Ibid. as decreed by Cowper C. in Case of Burton v. Hastings.—S. C. cited Gilb. Law of Uses 334.

11. Upon a bill to supply the defective execution of an agreement made by the father of the plaintiffs, whereby the estate was to be settled on the plaintiffs severally for life, remainder to their first and other sons successively in tail, a decree was obtained

obtained accordingly, and it was referr'd to the master to settle a conveyance. See Abr. Equ. Cases 2. in pl. 7. Mich. 1727. Finch. and Ld. Winchelsea.

[295] 13. Where articles are entered into before marriage, and the settlement is made after marriage different from those articles; as if by the articles the estate was to be in strict settlement, and by the settlement the husband is made tenant in tail, whereby he has it in his power to bar the issue, this Court will set up the articles against the settlement. But where both articles and settlement are previous to the marriage, at a time when all parties are at liberty, the settlement differing from the articles will be taken as a new agreement between them, and will controul the articles. And tho' in the Case of * WEST v. ERRISSEY. Mich. 1726, in the Court of Exchequer, and in the House of Lords in 1727, the articles were made to controul the settlement made before marriage, yet that resolution no ways contradicts the general rule; for in that case the settlement was expressly mentioned to be made in pursuance and performance of the marriage articles, whereby the intent appear'd to be still the same as it was at the making the articles. Cases in Chan. in Ld. Talbot's time. 20. cited in a N. B. there, as said by Ld. Chan. Talbot, Novemb. 10. 1736. Legg v. Goldwire.

* See (Y)
S. C.

(F. a) Settlements. Broke into by Decree.

1. BOND was given after marriage to secure 400*l.* part of the wife's portion, as follows, viz. to pay the interest to the husband and wife for their lives, and after the death of the survivor to pay the principal to the children equally, or as the husband should appoint, in case there were no children. The husband being grown very poor prayed to have 200*l.* to purchase an office, and the wife consenting thereto upon a private examination in Court the same was decreed. Fin. R. 365. Trin. 30 Car. 2. Brudnell & Ormè v. Price.

But where upon marriage lands were settled in strict settlement, and a bill was brought by the husband and wife, suggesting that they had been married 12 years, and never had any issue,

and having contracted debts, and praying that they might be enabled to sell part of the estate for payment of debts, and the trustee by answer confessed the same, and likewise that he believed they never would have any issue, and submitted to do as the Court should direct, he being indemnified,

2. By a settlement on marriage 1500*l.* were to be laid out in lands, and settled on husband and wife, and then on the issue; but the wife's father, who had the 1500*l.* being his daughter's portion, in his hands, did at the importunity of his daughter and son in law let them have the money to imploy in trade. And on a bill by the father against the son in law, daughter, and trustees, to be indemnified because of the deed, and the coverture of the daughter by which her consent would not bind her, and all parties being before the Court, and consenting that the plaintiff (the father) be discharged, and the deed cancelled, it was decreed accordingly. Fin. Rep. 448. Trin. 32 Car. 2. 1680. Donning v. Le-need, and Ux, & al.

And tho' it was insisted, that the Court in such cases had decreed a sale for payment of debts, and cited the Case of *DICKEY v. CORNWALLIS*, and also Sir JOHN TUFTON's Case as precedents, and urged that necessity creates a natural equity, yet Ld. North declar'd, he did not see how he could make such a decree; for he had known where people had been married near 20 years without issue, and afterwards had children. But at the plaintiff's importunity he gave time till Mich. Term to attend him with precedents. Vern. 181. Trin. 1683. *Davies v. Weld & al* — 2 Ch. Cases 144. S. C. says, that the wife's portion was not paid, and that by that and other occasions, the husband was in debt 400/. that the estate settled was alleged to be 600/. a year, and that the bill was against the remainder-man for life [it seems this is meant the trustee for life of the husband to preserve the contingent remainders] to join in sale of some part, and that the father and mother [quære, if it should not be (husband and wife)] were eaten out with great debts, and driven to great want. And precedents were cited where it had been done. But Ld. North said, he could not justify to decree a breach of trust; and that if it had been done, it might be where recompence was made; and at last ordered precedents to be looked into. — Where the husband before the settlement had mortgaged the same lands to one, and confessed a judgment to another, and six years after the settlement made, having no issue, he entered into articles for sale thereof, and the vendee brought a bill for a specific execution, and that the trustees might join, it was insisted for the plaintiff, that the settlement being only of an equity of redemption, the mortgagee was not bound by it, but might not only enter, but foreclose, which would bind tho' issue should be born afterwards; and that the husband and wife not being able to redeem a sale was absolutely necessary, or otherwise the redemption would be lost to husband and wife, and also to the issue if any should be. And the Master of the Rolls decreed the trustees to join in sale, and the trustees to be indemnified, the settlement being only of an equity of redemption, and the wife being in Court, and examined whether she freely consented or not to the sale. 2 Vern. 303. Mich. 1693. *Platt v. Sprig & al.* — S. C. cited per Cur. 2 Wms's Rep. 616, 617. Mich. 1732. in Case [296] of *Manfell v. Manfell*.

(G. a) Pleadings. *How the Marriage to be pleaded.* See (F. 2.) pl. 2. 4.

1. [N debt on bond the defendant pleaded *ne unques accouple in loyal matrimony*; the plaintiff demurred, and had judgment; for it admits a marriage, but denies the legality of it; whereas a marriage de facto is sufficient, and whether legal or not legal is no ways material. 2 Salk. 437. Trin. 1 W. & M. S. C. He should have pleaded no marriage in fact. Show. 50.

B. R. Alleyn and Ux v. Grey.

2. The constant form of pleading marriage is, that it was *per presbiterum sacris ordinibus constitutum*. 1 Salk. 120. 9 Annæ. *Heydon v. Gould.*

3. A bond was given by the defendant to a young woman in the penalty of 1000/. reciting that she had agreed to marry him, and conditioned that he would marry her according to the rites and ceremonies of the Church of England within a twelve-month, or else pay the sum of 500/. The defendant not having married her, and having got the bond out of her possession and destroy'd it, she brought her bill in the Court of Chancery (which after her death was revived by her representative) praying a satisfaction for the 500/. At the hearing the chief matter insisted upon on the part of the defendant was, that the plaintiff in her bill had *not averr'd*, that she herself was ready and willing to have married the defendant, that the marriage was not in his power alone, but her consent was necessary; and that wherever the act of the obligee is necessary to the performance of the condition, a readiness on his side must be shewn. But the Court held, the plaintiff's bill was sufficient without such averment, and that the case must be considered as if an action at law had

been brought upon this bond. Now at law the plaintiff need not have averred that she was ready and willing, but it would be *incumbent on the defendant to shew the contrary* as an excuse for his non-performance, viz. that he was ready and offered, and requested her, but she refused; for he must not only have shewn a readiness on his part, but a refusal on hers: besides, in all cases of contracts the nature of the thing is to be consider'd, and from the modesty of the woman's sex, the law presumes that *the request is to arise on the part of the man, unless the agreement is to the contrary*. Accordingly the Court decreed the 500 l. to the representative with costs, and interest from the time of filing the original bill. Hill. Vacation 1738. *Atkins v. Farr*.

(H. a) Forcible Marriage. The Offence thereof.

This statute stands upon a preamble and a purview. The preamble is where women &c. having substance &c. for the lucre of such substance are oftentimes taken by mis-doers [297] contrary to their will, and after are married or defiled, so that these 3 words in the preamble are observable, viz. 1. Be

1. 3 H. 7. cap. 2. *WHERE* women, as well maidens as widows and wives, having substances, some in goods moveable, and some in lands and tenements, and some being heirs apparent unto their ancestors, for the lucre of such substances be oftentimes taken by mis-doers contrary to their will, and after married to such mis-doers, or to other by their assent, or defiled to the great displeasure of God, and contrary to the king's laws, and disparagement of the said women, and utter heaviness and discomfort of their friends, and to the evil ensample of all other: it is therefore ordained, established and enacted by our sovereign lord the king, by the advice of the lords spiritual and temporal, and the commons in the said parliament assembled, and by authority of the same, That what person or persons from henceforth, that taketh any woman (so) against her will unlawfully, that is to say, maid, widow, or wife, that such taking, procuring, and abetting to the same, and also receiving wittingly the same woman so taken against her will, and knowing the same, be felony: and that such mis-doers, takers, and procurators to the same, and receivers, knowing the said offence in form aforesaid, be henceforth reputed and adjudged as * principal felons; provided always, that this act extends not to any person taking any woman only claiming her as his ward or bond woman.

2. Be married. 3. Be defiled. The purview is, that what person &c. taketh any woman (so) against her will unlawfully &c. such taking, procuring and abetting &c. and also receiving &c. and knowing the same shall be felony; and that such mis-doers &c. shall be reputed &c. as principal felons. So that it is *not said* in the purview (*so taken, married, or defiled*) but only (*so taken against her will*.) And upon this, great question was mov'd, 4 & 5 P. & M. in the Star-chamber, viz. Whether the *eloignement against her will, without marriage or carnal copulation* (which is intended by the word *defiled*) be felony or no? And the opinion of Brook, and some other of the justices was, that it was; but Saunders Ch. J. was against it. 12 Rep. 20. in the Case of Stealing of Women.—But it was afterwards resolv'd, that if a feme be *taken against her will* by rioters, and *solicited and threatened to marry, but does not*, this is not felony by this statute. But if she had been married, or defiled, it had been felony by that statute, and not otherwise; for tho' the body of the law says, that such taking shall be felony. yet the *intention of the act is expounded* by the said taking with force, and after they are married or defiled; and this was the mischief which the statute intended to prevent; per all the Justices tiembled at Serjeant's Inn. Hill. 16 Eliz. And. 115. pl. 160.—S. C. cited per Periam Ch. B. 12 Rep 20. And that the purview ought to pursue the mischief. And dly, this word (*so*) hath reference to the preamble, and all the mischief contained in it.—S. P. Sav. 51. pl. 127. Pasch. 25 Eliz. Anon.

S. C. cited Hob 82, 183. in Case of Bruton v. Morris.—S. C. cited Cro. C. 485, 486. in Lady Fulwood's Case.

Upon consideration of this statute it was resolv'd by Coke Ch. J. Yelverton, Williams, Crig and others, that whereas it is provided that what person soever, who takes a person against her will &c. altho' the body of the act extends to *taking* only, yet in respect of this word (*so*) it *both* relates to the preamble (to such person as is describ'd in the preamble, viz. *having substance*); it was agreed by all, that if *she both nothing, nor is heir apparent*, it is out of the statute; for the statute would not have been so curious in describing the person, and all in vain. 2dly, The word (*so*) relates to the quality and event of the taking mentioned in the preamble, viz. *to be married or defiled*; for if she be not married or defiled it is not such a taking (*so*) viz. *so married, or so defiled*; and it is not reasonable, that (*so*) should have relation to the taking, which is more remote, and not to the marriage or defiling which is nearer. Quod fuit concessum. 12 Rep. 99. Trin. 10 Jac. Baker v. Hall.—S. C. cited Hutt. 3. Trin. 15 Jac. And there, upon divers assemblies of all the Judges, it was observed, that the body of the act seems to be general, viz. *he that shall take any woman so against her will*. And it was said to be a great inconvenience to make it felony to take an heir apparent of a poor man, or to take a poor woman which hath but a very small portion, and of mean parentage, and (as was said) of a woman in a red petticoat, and yet not be so to take the daughter of an Earl or of some other great man. But it was resolv'd, that the *body of the act is incorporated with the preamble*; for it had been adjudged, that taking a woman with intent to marry or deflower her &c. is not felony without the doing it, and this rests upon the preamble, and then shall have relation to such woman before nam'd, viz. *maid, widow, or wife, having substance, and to an heir apparent, and to no other*. Hutt. 2. 3.—Hob. 382. pl. 210. seems to be S. C. by the name of Bruton v. Morris & al.—S. C. cited Cro. C. 425. in Lady Fulwood's Case.

* Note, By the express purview of the act the *accessory both before and after* is made principal &c. But by a construction of the common law, they that *receive the misdoers, and not the women, are accessories*; for this act makes the receivers of the women the principals. 12 Rep. 21. The Case of Stealing of Women.—S. P. 12 Rep. 97. Trin. 10 Jac. in Case of Baker v. Hall.—3 Inst. 61. cap. 12. S. P.—S. P. Dal. 22. pl. 3. 3 & 4 P. & M.—S. P. Hawk. Pl. C. 110. cap. 42. s. 8. because the words are *receiving wittingly the same woman so taken &c.* But he says it seems clearly, that they are accessories after the offence, according to the known rules of common law.—The being married in the presence of a person not party to the forcible taking or consenting thereto was held not to be an offence within the statute. Cro. C. 488. 489. Mich. 13 Car. B. R. Lady Fulwood's Case.—Hawk. Pl. C. 110. cap. 42. s. 9.

2. A. B. and C. were indicted in Surry, for that E. was a maid, who had a *portion of 1300 l.* and they violenter et felonice assaulted her at S. in Com. S. and her there took away by force and against her will on the 23d August &c. and the same day and year the said A. married her at S. by the abetment and procurement of the said B. and C. The evidence was, that she was taken in Middlesex with swords drawn, and carried into Surry and married there, and tho' divers witnesses offered to prove, that she said she was willing to marry him, and appointed a taylor to make her a gown, and was found in bed with him. All the Court (absente Berkley) held this taking in Middlesex a *continuing force, and a forcible caption in Surry*, and an offence within the statute. And tho' her not knowing what she did, by reason of the fear she was under at the time of the marriage, might avoid the marriage, yet it was such a marriage as was an offence within the statute. But because it did not appear that C. was party to the forcible taking or consenting thereto, it was not an offence in her within the statute. And the Court being full resolved that judgment be given, which Jones J. pronounc'd, and said that the statute is not obsolete, as had been objected, and as to the pretence that E. was married with her consent, and so not within the statute, that the *taking* being unlawful, and *against her will*, tho' the *marriage was with her will*, yet was felony within the statute, and this was agreed by all. And all held, that tho' this was not a marriage de jure, because she was

Hob. 183. at the end of the Case of BRUTON v. MORRIS, adds a *quære*, If the taking, the lands, and the marrying or deflowering were in several counties? For [298] (he says) it is felony compos'd of all those 3 things, as murder is of the stroke and death. —Cro. C. 485, 486. cites S. P. as in And. 115. but it is mistaken there for Hob. 183.

—Serjeant
Hawkins
says, the of-
fender may
be indicted
and found
guilty in the

county where the marriage &c. is, because the continuing of the force there amounts to a forcible taking within the statute. Hawk. Pl. C. 110. cap. 42. s. 10.—2 Hawk. Pl. C. 221. cap. 25. s. 38.

in such fear (as she affirm'd upon her oath) that she knew not what she said or did, yet it is a marriage de facto, and is felony within the statute; wherefore judgment was given that they should be hang'd. Cro. C. 482. 484. 488. 492. Mich. 13 Car. B. R. Lady Fulwood and Bowen's Case.

3. A. young woman of 14 years of age and 5000l. fortune was inveigled into Hyde Park by one Mrs. B. a confederate with J. S. to take the air in a coach, and being in the park the coachman drove away from the company, when J. S. who came to the coachside in a mask, perswaded B. to quit the coach and pulled out A.'s maid; then J. S. got into the coach detaining A. therein till the coachman carried them to his lodgings in the Strand, where the next morning he prevailed upon her to marry him, after having threatened to carry her beyond sea if she refused, but was apprehended the same day in the same house. The Court seriatim delivered their opinions, that she was to be admitted a witness notwithstanding she was a wife de facto. That this was one continuing force upon her from the beginning to the marriage, so that whatever was done while she was under that violence was not to be respected; and it was held, that the evidence was clear as to all the points of the statute. 1st. That the taking was by force. 2d. That the woman had substance according to the statute. 3d. That marriage ensued, tho' it did not appear that she was deflowered; and being found guilty, judgment was given and he was hanged. Vent. 243. Trin. 25 Car. 2. B. R. John Brown's Case.

4. Pending a suit in the Spiritual Court *causa jactitationis maritagii* the woman exhibited an indictment also in B. R. against all the witnesses who might prove the marriage, and it was for a conspiracy by force and arms to carry her away against her will &c. This indictment was brought that the parties might be convicted upon the oath of the woman, and so disabled to be witnesses in the Ecclesiastical Court to prove the marriage, which by this means might be avoided; and therefore Serjeant Pemberton moved to stay proceedings upon the indictment until the suit in the Spiritual Court was determined; this was opposed by Serjeant Termaine and the King's council, as not practicable to stay proceedings in the King's cause for any matter depending in a private Court, especially in this case where the indictment was for a force in taking and carrying away of a woman, and marrying her against her consent, and so a thing collateral to the suit in the other Court; neither was this suit for delay, for the defendant had indicted two of the witnesses against him for perjury; the Court would not stay the proceedings upon the indictment, but it was tried at the bar, and the woman being produced as a witness it was objected against her that she ought not to be allowed to give her evidence, because there was a marriage proved in the Spiritual Court; and where the consequence

quence of the evidence will redound to the benefit of the witness he is always rejected; Curia, Brown was executed for stealing * Mrs. Ramsey, and she was allowed to be a witness in that case. And in Fulwood's Case upon the statute of H. 7. the woman was allowed to be a witness; and so she was in this case. 4 Mod. 8. Hill. 2 W. & M. in B. R. The King and Queen v. Fezas.

5. Several were indicted upon the statute of 3 H. 7. 2. against stealing of women &c. the indictment did *set forth the woman's age, that she was an heiress to J. S. was worth in goods and chattels so much, and so much in land of inheritance; that she was a virgin.* And upon evidence, the case appeared to be thus: B. personating a country lady, though in truth a woman of the town, took a lodging in the house where A. lodged and after some time introduced S. into the house as her brother, where he frequently had the conversation of the said A. In the mean time B. used to magnify her pretended brother's merit and goodness, insomuch that the said A. had likewise declared her liking of S. and wished he would marry her. But to get her abroad without any of her friends B. deluded her aunt and her to go with her to church; and against the time got bailiffs to take out a writ against A. and her aunt, and so they way-layed and arrested them, and conveyed them from Westminster, where they lived, first to the Garter-Tavern in Drury-Lane, and there separated the aunt and her, and carried her to Holborn to the Vine-Tavern, where S. came as her bail, and there married her, continuing under the arrest; B. telling her that if she did not marry S. she must go to Newgate. And S. and B. were found guilty; for the Court delivered it to the jury for law, that tho' the said A. might have a fancy for the man, yet because she was not privy to the contrivance of coming out to him, and knew not beforehand, or consented so to come to him, and being married whilst she continued under that restraint and violence, *tho' perhaps she consented to the marriage, yet the said fact was a crime* within the statute; for here was a forcible taking away, and her subsequent consent whilst under the restraint could not be looked upon but an effect of the continuing force; and that *tho' S. had known nothing of the first force, yet he knowing her to be under it, and marrying while he knew her to be under it, made him approve of the first force, and to partake of it so as to be guilty.* Note, upon this statute, all aiders and assisters are principals; and note, the man was hanged: Hartly and Spurr the bailiffs were acquitted. Far. 101, 102, Mich. 1 Annæ. in B. R. The Queen v. Swanson, Baynton, Hartley and Spurr.

6. Serjeant Hawkins says the following points (among others before mentioned) have been resolved. 1st. That the indictment *must expressly set forth*, both that the woman taken away *had lands or goods, or was heir apparent, and also that she was married or defiled*; because no other case is within the preamble of the statute to which the enacting clause clearly refers; for it does not say,

say, that what person &c. taketh any woman against her will, but what person that taketh any woman so against her will. 2d. That the indictment ought also to alledge, that the taking was *for lucre*, because the words of the preamble are so; but that it needs not set forth, that it was with an intention to marry or defile the party, because the words of the statute neither require such an intention, nor does the want thereof any way lessen the injury. 3d. That it is no manner of excuse, that the woman at first was *taken away with her own consent*, because if she afterwards refuse to continue with the offender, and be forced against her will, she may from that time as properly be said to be taken against her will, as if she had never given any consent at all; for till the force was put upon her, she was in her own power. 4th. That it is not material whether a woman so taken away be at last *married, or defiled, with her own consent* or not, if she were under the force at the time, because the offender is in both cases equally within the words of the statute, and shall not be construed to be out of the meaning of it for having prevailed over the weakness of a woman, whom by so base means he got into his power. Hawk. Pl. C. 109, 110, cap. 42. s. 4, 5, 6, 7.

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7. 39 Eliz. 9. s. 1. *He that taketh away a woman against her will (having lands or goods, or being heir apparent to her ancestor) contrary to the 3 H. 7. 2. or being arraigned for such offence, stands mute, answers not directly, or challengeth above 20, shall not have the benefit of clergy.*

S. 2. *The same law against procurers and accessaries before such offence committed.*

8. 4 & 5 P. & M. cap. 8. s. 4. *If any person shall contract matrimony with a maid, or woman-child under the age of 16 years, without the consent of her father, if living, and if he be dead, without the consent of the mother, or other guardian of such child, he shall suffer 5 years imprisonment, and have a fine imposed upon him, one moiety whereof shall go to the crown, and the other to the party grieved.*

S. 6. *And if any maid or woman-child above the age of 12 years and under 16 do agree to marry such person without the consent of her parents or guardians as aforesaid, then the next of kin to her, to whom her lands should descend, or come after her decease, shall from the time of such agreement hold and enjoy all such lands, tenements, and hereditaments, as the same woman-child had in possession, reversion or remainder, during her life, and after her death the said lands &c. shall descend and come to such person as they should have done before the making of this act, other than to him only who did so contract matrimony.*

For more of Marriage in general, see Baron and Feme, Divorce, and other proper titles.

Marital

Marshal and * Marshalsea.

(A) Of the Office of Marshal, and Grants of it.

1. THE Court of Marshalsea is of as great antiquity † as any court, as appears by L. 5. E. 4. fo. 129. where it is said to be one of the ancientest Courts of this realm. It follows the person of the King, be he within or out of the realm; for being in France, in alieno regno, he did justice there upon an offender within the verge; but yet its dignity is short of that of B. R. the first is only a peculiar and private liberty, but B. R. is a Court for the common law, and for general matters; the first as mentioned in articuli super chartas cap. 3. is of things done *inter gens de hostile le roy*, the other is *inter gens de peuple*; per Croke Justice. Buls. 207. 208. Trin. 10 Jac. B. R. in Case of Cox v. Gray.

* Court of Marshalsea, (Curia Palatii) is a Court of Record to hear and determine causes between the servants of the King's household and others within the verge; and hath jurisdiction of all matters within the verge of the Court, and of pleas of trespass, where either party is of the King's family;

and of all other actions personal, wherein both parties are the King's servants; and this is the original jurisdiction of the Court of Marshalsea: but the Curia Palatii, erected by King Charles I. by letters patent, in the 6th year of his reign, and made a Court of Record, hath power to try all personal actions, as debt, trespass, slander, trover, action on the case &c. between party and party, the liberty whereof extends 12 miles about Whitehall; which jurisdiction hath since been confirmed by King Charles the 2d. And the Judges of this Court are the steward of the King's household, and knight marshal for the time being, and the steward of the Court, or his deputy, being always a lawyer. Crompt. Jurisd. 102. Kitch. 109. &c. 2 Inst 548. This Court is kept once a week in Southwark: and the proceedings here are either by *capias* or *attachment*, which is to be served on the defendant by one of the knight marshal's men, who takes bond with sureties for his appearance at the next Court; upon which appearance he must give bail, to answer the condemnation of the Court; and the next Court after the bail is taken, the plaintiff is to declare, and set forth the cause of his action, and afterwards proceed to issue and trial by a jury, according to the custom of the common Law Courts. If a cause is considerable, it is usually removed into B. R. or C. B. by an *habeas corpus cum causa*; otherwise causes are here brought to trial in 4 or 5 court-days. Practis. Solic. 409. 410. This Marshalsea is that of the household, not the King's Marshalsea which belongs to the King's Bench. Jac. Law Dict. verbo Court of Marshalsea cites the aforesaid books.—† 10 Rep. 79. b. Arg. cites 4 H. 6. 8. b. and diversity of Courts tit. Marshalsea and Fleta. lib. 2. cap. 2. and Britton. cap. 1.—Williams J. held that it was a Court by prescription. Buls. 208.—But Fleming Ch. J. contra; because every prescription implies a grant, whereas this Court was not instituted by grant but was *de communi jure* as all other Courts of Justice are, and this *pro necessitate*; and so of [301] B. R. and C. B. they have not their commencement by prescription or patent, but *de communi jure*, and so of the Marshalsea; for as long as there is a King, so long of absolute necessity there must be a Court of Marshalsea; for it is very necessary for the King to be always attended by his servants, and if they shall be drawn by suits into other Courts, he will then lose their service during such time. Buls. 201.—This Court hath its foundation from the common law of England. 4 Inst. 130. cap. 18.—It was held in *aula regis*, and no writ was necessary for actions brought there, nor was any privilege allowable. Fleta. 66. lib. 2. cap. 2.

2. The Duke of Norfolk came into B. R. and T. B. with him, and shewed that he had admitted J. B. to the office of marshal for life, and that J. B. had forfeited the office to him granted, and that he had admitted T. B. and upon great examination of the defaults of J. B. and finding them, the Court admitted T. B. and swore

The Queen granted to George Earl of Shrewsbury, anno 15 of her reign, the

office of Earl Marshal of England, and now came the said Earl and prayed, that J. S. one of his servants to whom he had granted the office of Marshal of the King's Bench might be admitted to it, because the same is an office incident to his office and in his power to grant, and that Know-

les, to whom the Queen had granted the said office of Marshal of the King's Bench by the attainder of North be removed; and a precedent was shewn 14 & 15 Eliz. betwixt GAWDREY AND VISMAY, where it was agreed, that the said office was a several office from the said great office, and not incident to it; and as to the Case of 39 H. 6. 33, 34. the truth is, the said office of Marshal of the King's Bench was granted expressly by the Duke by express words, and so he had it not as incident to his office of Marshal of England; on the other side, there were three precedents shewed, first in the time of B. 2. that the office of the Marshal of the King's Bench was appendant to the said office of Marshal of England. Secondly, 8 R. 2. when the said great office was in the King, he granted the said office of Marshal of the King's Bench, but 20 R. 2. both offices were rejoined as they were before in ancient time; and there were also shewed letters patents of 4 E. 4. and 19 H. 8. by which it appeared, that the said inferiour office had time out of mind been part of the great office; and it was moved, that when the said great office is in the King's hands, and the King grants the said under office, if now this office be not severed from the great office for ever. Per Wray, it is no severance, for the chief office is an office of dignity which may remain in the King, but this under office is an office of necessity; and the King himself cannot execute it, by which of necessity he ought to grant it. 1 Le. 320, 321. Trin. 31 Eliz. B. R. Anon.

3. And so see that the Duke was officer in fee, and granted it to J. B. for life, therefore see that it may be granted over, and that the letters of the Duke were inrolled of record before them at the prayer of the Duke by his attorney, and how after the Duke came into Court ut supra, and prayed ut supra, and that the said J. B. was solemnly demanded to come and attend at his office in the Court, and did not come, but that N. came as his deputy by the patent ut supra, and the examination of J. B. of his prisoners escaped, and that he said as to some, that he did not know where they were, and as to some he said nothing, and as to some he said that he would make gree to the parties, and so they entred all the matter from the beginning to the end, and admitted T. B. and swore him, saving to the said J. B. his action, title and interest, which may come by reason of the said office and grant, and so J. B. was put out and T. B. admitted &c. Br. Forfeiture de terres, pl. 27. cites 39 H. 6. 32.

4. No Marshal of B. R. can sit there as officer of the Court till he be first admitted by the Court. Cumb. 3. Mich. 1 Jac. 2. B. R. Anon.

5. The right of the office is in the King only; per Wright. Cumb. 3. Mich. 1 Jac. 2. B. R. Anon.

6. The Marshal is an officer who is to give a due attendance upon the Court, and to take into his custody, and safely to keep, all such prisoners as shall be committed to his custody by the Court, upon any account whatsoever. L. P. R. 192.

7. The Marshal of the Marshalsea of this Court, is intended to be always present in the Court while the Court is sitting; for it is his office to be always attending upon the Court to execute his office in relation to the Court upon all occasions that may fall out sitting the Court; and he is fineable for his absence, and his non-attendance is a forfeiture of his office. L. P. R. 192, 193. cites Hill. 21 & 22 Car. 2. in B. R.

8. 8 & 9 W. 3. cap. * 27. §. 10. enacts, That after the 24th of June 1697, all conveyances, grants, and mortgages of the inheritance of the prisons of the King's Bench and Fleet, and of the prison-houses, lands, tenements, and hereditaments thereto belonging, and all leases thereof, and the respective titles of the said Marshal and Warden, or of them in whom the inheritance of the said prisons and premisses now are, and all trusts and declarations of trusts thereto relating, shall be enrolled (viz.) that of the Marshal in the King's Bench, and that of Warden in the Court of Common Pleas within 6 months after executing such conveyances, grants, leases, or deeds of trust as aforesaid, or they shall be void.

* So it is in Cay's Abr. tit. Prisons; [302] but in Keble's statutes at large, and in Wingates Abr. it is 26.

9. The Earl Marshal of England was by his office Marshal of the King's Bench as appears by the book of H. 6. and so continued to the time of King James I. when this office was derived out of it; so that the Marshal of the King is the Marshal of B. R. and no body else can be understood; the other is *Marescallus Hospitii*, and never spoken of without that addition; per Holt Ch. J. and Powell J. 2 Salk. 439. Mich. 1 Annæ. B. R. in Case of Snow v. Firebrass.

10. The office of Chamberlain of the King's Bench prison is inseparably incident to the office of Marshal, and therefore a grant of the office of Marshal with a reservation of the office of Chamberlain is void; per Holt Ch. J. Mich. 3 Ann. B. R. 2 Salk. 439.

(A. 2) Jurisdiction of the Court, and what Matters are triable there, and Pleadings.

1. Artic. super Chart. 28 E. 1. cap. 3. **T**HE Stewards and Marshals of the King's house, shall not hold plea of freehold, debt, * covenant or contract, but only of † trespass done in the house or verge, or of contracts and covenants when both parties are of the house, and the plea of trespass shall be determined ‡ before the King's departure from the verge where the trespass was committed; and therefore the plea thereof shall be speedy *de die in diem*: and if the plea cannot be determined in time, the plaintiff shall (in such case) have recourse to the common law.

Croke J. said, that this statute was made *ad emendationes status populi* &c. *quod de cetero ordinatum est.* Bull. 208. Trin. 10 Jac. in Case of Cox v.

Gray.—But Ibid. 211. Fleming Ch. J. said, that this statute had left their jurisdiction more uncertain than before, and that it is so doubtfully penn'd that the books very much differ in the reciting of it, and in this they are faulty; that this statute is as a labyrinth; within this kingdom there are many companies and societies, and therefore the law creates a Court for every jurisdiction. That the Court of B. R. and C. B. were formerly itinerant and attendant upon the King, as the Marshalsea is now, and tho' B. R. be in certo loco now, yet if the King so command, it is itinerant, and may put down all commissions of oyer and terminer, but not the jurisdiction of the Court of Marshalsea; and this was the reason, that ** no writ of error lay at common law to reverse a judgment given in the Marshalsea, till the statute 5 E. 3. cap. 2. tho' it lay then to reverse judgments given in all other Courts, as in Ireland, Calice &c. for the Marshalsea had no Court above it. The title of the Court is *Aula Hospitii Domini Regis*, and not *infra virgam*.—And Ibid. 212. says, the scope and purport is to limit their jurisdictions, so as before this statute there was a mischief, which it intended to redress; but it is so doubtfully penn'd as never was the like, and the whole construction of this statute, does chiefly rest upon the place where the true comma ought to be, and

and upon the true relation of the words to couple all together.—²² No writ of error lay, but in parliament. 10 Rep. 79. b. Arg. in the case of the Marshalsea.—The title of this statute is,—Of the estates [authority] of stewards, and of marshals, and of pleas, which they ought [devoient] to hold, [or according to Rastall, may hold] and how. 2 Inst. 547, 548. And from the word [devoient] observes, that this act restores and confines this Court to its right and just jurisdiction, and that it hence appears to be in affirmance of the common law, and purposely made to relieve the subject against the usurpations and incroachments of the Steward and Marshal; and tho' the words are general, they are to be understood, of the Steward of the Court of Marshalsea of the household, and not of the Steward of the King's household. And the Marshal is to be understood, of the Marshal of the household, and so the Marshalsea is to be understood of the household, and not of the King's Marshalsea; for that belongs to the King's Bench.—10 Rep. 74. b.—²³ Vid. pl. 2, 3, 4, 5.—²⁴ Action upon this statute, because the defendant impleaded the plaintiff in the Marshalsea for trespass, where *neither the one nor the other was of the King's household*. And it was agreed by the justices, that for *trespass done within the verge*, the one or the other ought to be of the Marshalsea [household], and the *pleading to the action in the Marshalsea is no estoppel to the party to say after that he was [not] of the King's household, at the time, &c.* Br. Action sur le Statute, pl. 35. cites 10 H. 6. 13.—The letter of the statute, as to trespass within the verge, and the practice is con-

[303] trary to this case. Ibid. Marg.—And Br. Jurisdiction, pl. 97. S. C. Brook says, that he wonders at it; for that it seems otherwise by the words of the statute; and the answer of the plaintiff to the action of the defendant in the Marshalsea is no estoppel in the Court [C. B.] to say, that he was not *de hostel del roy* at the time of the action &c.—And Br. Action sur le Statute, pl. 38. after rehearsing part of this statute, he says, and so see of *trespass done within the verge*, as above the action lies there between whomsoever, *tho' they are not in the King's house*.—In trespass one of the parties ought to be of the household, and if one be it is good; per Fleming Ch. J. Bull. 212, 213. Trip. 10 Jac. Cox v. Gray.—Fleming Ch. J. says; that the only book to be relied upon is this Case of 10 H. 6. 13. it being a Case upon the statute, and that the law is there truly taken, that if none of the parties are of the King's household, the same is not to be tried there; for if he owes no attendance there he shall not be subject to their jurisdiction. Bull. 213. in Case of Cox v. Gray.—Nota, that in this case the 3 judges, viz. Croke, Williams and Yelverton did agree clearly, that in all actions in the Marshalsea both parties ought to be of the household, or else the matter is out of their jurisdiction. But in this point Fleming Ch. J. differed from them; for he agreed that in \parallel debt, covenant and contract both parties ought to be of the household, but in ∇ trespass it is sufficient if one only be, and that in such case they have good jurisdiction of the cause. Quod nota. Bull. 213, 214. in Case of Cox v. Gray. — 2 Inst. 548. S. P.— ∇ S. P. 2 Inst. 548.—Contrary of debt and covenant, and therefore quære of action upon the case there *between strangers upon assumpsit*; for it seems that this is a contract. Br. Action sur le Statute, pl. 38. cites Lib. Div. Cur.—If an action be on the case in nature of debt &c. in the Marshalsea, it shall hold plea thereof; per Fleming Ch. J. Bull. 212. Trin. 10 Jac. in Case of Cox v. Gray.

Tho' the act speaks of trespasses generally, yet it is *intendible only* of trespasses *vi & armis*, as of battery, or taking away goods, but not of *quare clausum fregit*, nor of trespasses and *grievances*, nor of trespasses upon the case, nor of *detinue*, nor of any other personal action, nor of any real or mixt action, notwithstanding the general words of the statute 33 H. 8. For particular jurisdictions derogating from the jurisdiction of the general Courts of the common law are ever taken strictly. 2 Inst. 548.—It extends only to *trespass simpliciter*, and not *trespass secundum quid*, and so not to action on the case upon trover and conversion, as was adjudged in GAY's Case, for which reason a judgment there given was revers'd. 10 Rep. 76. a.—Bull. 207. Trin. 10 Jac. Cox v. Grey.—6 Rep. 20. b. Pasch. 38 Eliz. B. R. Michelborn's Case.—The Steward and Marshal had 2 authorities, a general and a particular; and by force of their first and general authority, they might have held all manner of pleas of the crown, and of common pleas, as well real and mixt as personal, as appears by divers ancient precepts of summons, which they us'd to direct to the sheriff &c. to cause to come before them all pleas &c. Resolv'd 10 Rep. 71. a. b. in the Case of the Marshalsea.—But as to their *particular authority before the said act, as Judges of the Marshalsea of the King's household*, they, as Judges of this Court, had no jurisdiction but of pleas of the crown, and of 3 particular common pleas, viz. debt, covenant and trespass *vi & armis*, &c. as in 2 Inst. 548. Resolved 10 Rep. 72. a.—The general authority was at will only; but the other was for life. 10 Rep. 72. a.

Error of a judgment in an action upon the case upon a trover in the Marshalsea, the trover and conversion being supposed at Southwark within the verge, and adjudged for the plaintiff. The error assigned was, *because none of the parties were del hostel le rogne, nor living within the verge*. And it was thereupon demurred: it was moved, that for this cause the judgment was erroneous; for that Court cannot hold pleas betwixt strangers; and in proof thereof was cited a precedent. Hill. 1 Ed. 4. Rot. 47. and the Book of Entries, 278. 10 H. 6. 13. 7 H. 6. 21. Popham and Fener held, that the action well lay; for the *statute of articuli super chartas*, cap. 3. which shews that trespasses shall not be brought there, nor action betwixt others than of the hostel of the king, is *intended of trespasses for land*, and not of such personal actions. And there be many precedents, that in all times such personal actions have been there brought and allowed. But Gaudy doubted thereof.

But they all held, that if the action be not determinable there, the judgment is void; yet error lies thereof. Sed adjournatur. Cro. E. 502. Pasch. 32 Eliz. Rot. 432. Baptist v. Michelbourn—6 Rep. 20. b. Pasch. 38 Eliz. B. R. MICHELBOURN's Case says, it was afterwards resolved, that judgment should be reversed, but inspecto recordo non intratur.—In this Case was cited the Case of READ v. PURCHASE. Mich. 32 H. 6. B. R. of trespass brought in the Marshalsea, and in error thereof brought, no error was assigned, but only that none of the parties were of the King's household, and for that error the judgment was reversed. 6 Rep. 20. b. and that with this accords 10 H. 6. 13. 7 H. 6. 30. b. 19 E. 4. 8. b. 20 E. 4. 16. b. 22 E. 4. 31.—S. C. of READ v. PURCHASE, cited by Croke J. Buls. 208. in Case of COX v. GRAY, and he said, that the Case of MICHELBOURN was terminis terminantibus the very case, the same action, and the same error assign'd with that of COX v. GRAY, and that the judgment in MICHELBOURN's Case was resolved to be reversed, but the reversal not entered on the record.—10 Rep. 77. b. says that Michelbourn's Case was adjudged.

† This is not to be understood of the King's going out of the bounds of the verge for his recreation, as to hunt, and without any purpose to tarry, abide, or make his repose in such place, his council and household still continuing where they were; for this is no removing within this statute. But when he goes in progress and his household goes with him, this is a removing within this act. 2 Inst. 548.

*The * Steward shall from henceforth take no consufance of debt or other things but of the people of the same house, nor shall hold plea by obligation made at the distress of the said Stewards or Marshals: and if any thing be done contrary to this act, it shall be holden void.*

* Tho' the Steward and Marshal are both judges, yet in this last branch

the Steward only is nam'd, because he only was the man of law, and therefore had the direction of the Court. 10 Rep. 75. a.

In an action upon this statute, the defendant pleaded *nil tiel record*. Br. Action sur le Stat. pl. 13. cites 7 H. 6. 30.—S. P. Br. Record, pl. 192. cites 7 H. 6. 33. But Candish objected that it is no plea; for the Steward is in a manner party, and it is not reason that he should certify it; but it shall be tried by averment; but durst not demur, but said that such record, and sued to have the record. [304]

*And forasmuch as heretofore many felonies that have been committed within the verge have been unpunished, and all because the Coroners of the county have not been authorised to enquire of felonies done within the verge, but only the Coroner of the King's house, which never continueth in one place, by reason whereof, there can be no trial made in due manner, * nor the felons put in exigent nor outlaw'd, nor nothing presented in the circuit, the which hath been as well to the great damage of the King, as to the disturbance of his peace: It is ordained, that from henceforth in † case of the death of men, whereof the Coroner's office is to make view and inquest, it shall be commanded to the Coroner of the county, that he with the Coroner of the King's house shall do as belongeth to his office, and inrol it; and what cannot be determined by the Steward before the King's departure, shall be remitted to the common law, so that exigent, outlawries, and presentments, shall be made thereupon in eyre, by the Coroner of the county, as in case of other felonies done out of the verge; howbeit they shall not omit, by reason hereof, to make attachments freshly upon the felonies done.*

Hence it appears, that by the common law the Coroner of the county could not intermeddle within the verge, but the Coroner of the verge, and that if he took an indictment of the death of man, it was not allowable in law, and so it is if the Coroner of the King's house take an indict-

ment of the death of man out of the verge, it is void, & coram non judice. And if an indictment of the death of a man, being slain out of the verge, be taken before the Coroner of the King's house and the Coroner of the county, and so entred of record, it is not sufficient, because the Coroner of the King's house joined with him, who had no authority. 2 Inst. 550.

* And yet the felony was not dispunishable; for at this time it might, after the remove of the King, be inquired of in the King's Bench, if the Bench sat in that county, or before Justices of oyer and terminer &c. Or if the Coroner of the verge had taken an indictment, tho' the King went out of the verge, yet the indictment ought to be removed into the King's Bench, for that is the center whereunto

whereunto all records of that nature do fall, and there the office might be heard and determined; but this act was made for more speedy proceeding, for being removed into the King's Bench there ought to be 15 days &c. And if a murder had been committed within the verge, and the King had removed before any indictment taken by the Coroner of the verge, the Coroner of the county might have inquired of the same at common law, ne maleficia remanent impunita. 2 Inst. 550.

† Of felonies done within the verge, the jurisdiction of the Steward or Marshal extends but to certain ones only, and those again limited to certain particular persons. For of ancient time they had † general authority as justices in eyre and as vice-gerents of the chief justices of England within the verge, and then they held plea of all felonies within the verge, but that power is now vanished. 2 Inst. 549.—This general authority vanish'd by this statute. 10 Rep. 73. b.—† 10 Rep. 71. a.

The whole Court agreed, that this Court cannot hold plea of co-

venants and contracts, unless both parties are of the household, and that all the matters whereof they can hold plea are trespasss, covenants and contracts of the household and within the verge. Brownl. 200. in Case of Hall and Stanley.

If the plaintiff be discharged of his service in the household, his action is gone;

2. The Marshalsea shall not hold plea of *contracts*, unless as well the *plaintiff as the defendant be of the King's house*; for if it be otherwise the defendant may plead it to the jurisdiction &c. Br. Action sur le Statute, pl. 38. cites Lib. Div. Cur.

3. And if the plaintiff removes out of the King's service pending the plea, the defendant may plead it, and shall abate the jurisdiction and the plea. Br. Action sur le Statute, pl. 38. cites Lib. Div. Cur.

per Fleming Ch. J. Buls. 213. in Case of Cox v. Gray.

S. P. per Fleming Ch. J. Buls. 213.

4. Contrary if the defendant removes out of the King's service. Br. Action sur le Statute, pl. 38. ut sup.

5. In debt upon recovery of damages before the Marshal in action of covenant before the Marshal it is a good plea, that none of the parties were of the King's household at the time &c. For the statute de articuli super chartas, cap. 3. wills as above, and therefore it is coram non judice if it be otherwise. Br. Action sur le Statute, pl. 49. cites 6 R. 2.

If it be of a thing done within the verge, the jury shall be

[305] of the county adjoining;

but if of a matter done within the household, then the jury shall be of the household; if of a matter where one is of the house and the other not, the trial shall be of two counties; and for the proximity of the county, if one of the household be su'd for a trespass done within the verge, the jury shall be of the verge, but of those within the household. Per Fleming Ch. J. Buls. 213. in Case of Cox v. Gray.

7. 10 E. 3. stat. 2. cap. 3. Where a man will complain of error before the Steward and Marshal, he shall have a writ to cause the record to come before the King in his place, and there the error shall be redressed.

8. 9 R. 2. cap. 5. Priests and others of the Holy Church taken in the Marshalsea shall pay such fees as lay people pay and no more.

9. 13 R. 2.

9. 13 R. 2. stat. 1. cap. 3. *The jurisdiction of the Steward and Marshal of the King's house shall extend no farther than 12 miles from the King's lodging.* This was in affirmance of the common law.

2 Inst. 543. 549.

10. 2 H. 4. cap. 23. s. 1. *The fees of the Marshal of the King's house shall be as in times past and no more, viz. for him that cometh in by capias 4d. and if he be bailed 2d. more; of the defendant in trespass, that findeth bail to answer the suit 2d. for every commitment by judgment 4d. for everyone delivered of felony, and of a felon bailed by the Court, 4d. And if the Marshal or his officers take more, they shall lose their offices, and pay treble damages to the party grieved; and the party grieved shall have his suit before the Steward of the same Court.*

S. 2. *Here a Server of bills shall take no more than 1d. for every mile distant from the Court to the place where he doth his office; but when he serves a venire facias, or a distringas, he shall have the double. If such an officer takes more he shall be imprisoned, make a fine to the King at the discretion of the Steward, and be from thenceforth forejudged the Court.*

11 15 H. 6. cap. 1. *In a suit commenced before the Steward and Marshal of the King's house the defendant shall not be estopped to plead, that the plaintiff or he are not of the King's house; but his averment thereof shall be received notwithstanding any record of the same Court to be produced to the contrary.*

And in such case where one of the parties is not of the household, and they

proceed, all is coram non judice. Per Fleming Ch. J. Buls. 213. in Case of Cox v. Gray.

12. 33 H. 8. cap. 12. enacts, *That all the treasons, misprisions of treasons, murders, manslughters, bloodsheds, and other malicious striking, by reason whereof blood is or shall be shed, which shall be done in any of the King's palaces or houses &c. shall be inquired, tried, heard and determined, before the Lord Steward of the King's household for the time being, or in his absence, before the Treasurer and Comptroller, and Steward of the Marshalsea, or any two of them, whereof the Steward to be one.*

So that these great officers and counsellors of State, the Lord Steward, Treasurer and Comptroller, have no jurisdiction

in these criminal causes, but only within the circuit of the King's palace or house. And it is to be observed, that this Court of the Marshalsea of the King's house was, as books speak, of ancient time instituted for those of the King's house; but they have incroached beyond their true jurisdiction; and Standford says, that the Steward and Marshal before this act might have heard and determined all felonies &c. perpetrated within the King's palace or house. 2 Inst. 549.

A robbery was committed in a town within the verge, and this appeared to the Court, yet the same was inquired of, heard and determined in B. R. and so it may be before Justices of oyer and terminer, and Justices of peace, because their jurisdiction is general thro' the whole county; but of an offence within the King's palace, it shall be heard and determined according to this act; upon which act this is observable; that if a man strike in the King's palace, where his royal person is resident, unless blood be shed, he loseth not his hand. 2 Inst. 549.

13. It was observed, that every act made concerning the Marshalsea either restrains or explains their jurisdiction, and no act adds any thing to it. 10 Rep. 76. a. in the Case of the Marshalsea.

14. The title of their Court in criminal cases, as Steward and Marshal of the Court of Marshalsea of the King's household, 10 Rep. 71. a. 73. a.

was *Placita Corona Aulae hospitii Domini Regis coram Seneschallo & Mareſchallo*, and always confined to felonies done within the circuit of the King's household, the bounds whereof are made certain by the statute 33 H. 8. cap. 12. 2 Inst. 545.

F. N. B.

241. (B)

S. P. —

But though

the plea be lawfully begun before the Steward and Marshal of the King's house within the verge and before the plea ended the King removes; now by this the plea is thereby discontinued, and then the party must commence his action at the common law, and not within the verge; and if he does, the party grieved shall have his writ. F. N. B. 241. (D).

See the arguments of Doderidge and Hutton Serjeants, on the demurrer. 2 Brownl. 124.

16. In *false imprisonment* the defendant as to all the trespasses except the battery, and imprisonment, and keeping in prison, pleaded not guilty; and as to that, pleaded that the Marshals Court is an ancient Court, and so justifies, because the plaintiff was the pledge of T. C. to the defendant in an action of trespass upon the case in a general *indebitatus assumpsit*, and thereupon a judgment against C. and thereupon a *capias* awarded, and a *non inventus* returned, and then a *capias* against the pledge [now plaintiff] according to the custom, by virtue whereof the plaintiff was taken and detained, and traverses, that he was guilty &c. of any imprisoning the plaintiff before such a day, and avers that they are the same persons. The plaintiff replied, that neither of the parties in the said action, at the time of exhibiting the bill, was of the King's household &c. The defendant demurred, and the plaintiff had judgment. Brownl. 199. Pasch. 9 Jac. Rot. 2289. Hall v. Stanley.

* S. P.

8 Mod. 307.

Mich. 11

Geo. 1. in

Case of the

King v. Ro-

berts.

17. A prohibition was prayed to the Marshalsea, because they refused to admit a plea that neither of the parties were de hospitio Regis. Per Holt Ch. J. this is not the Court mentioned in my Lord Coke's Case of the Marshalsea. If the cause of action arise within twelve miles of London, this Court holds plea, tho' the parties are not de hospitio Regis; the plea is frivolous, and we will not interpose. (But Trin. 11 W. 3. B. R. an action of * debt was brought in the Marshalsea on a judgment in B. R. and a prohibition was granted.) 2 Salk. 439. Mich. 10 W. 3. B. R. Anon.

18. The plaintiff declared in the Marshal's Court upon an *infimul computasset infra jurisdictionem* &c. and had judgment; it was objected that the account doth not alter the duty; for that may arise in York and that no other consideration being laid to intitle the Court to any jurisdiction, the judgment ought not to stand; but it was adjudged, that the account was sufficient to give the Court jurisdiction. 8 Mod. 77. Pasch. 8 Geo. 1723. Spackman v. Huffey.

* P. 2 Salk.

439. Mich.

10 W. 3. B.

R. Anon.

19. A. the defendant was indicted and acquitted in B. R. and afterwards brought an action in the Marshalsea against the prosecutor for a malicious prosecution. A motion was made to stop the proceedings there, because B. R. being possessed of the principal cause may better judge whether the prosecution was malicious

malicious or not. It was insisted, that debt lies in the Marshalsea, or any other Court, upon judgments in the Courts of Westminster. Besides, the plaintiff hath bail below in this action, and there is a *custom in the Marshalsea, that the attorney shall answer for such bail as he takes*, so that if the proceedings should be staid, the plaintiff would lose that benefit which he hath below against the attorney, the bail being really worth nothing. And per Cur. upon giving bail here as well as below, and likewise giving good bail, the action must be staid. 8 Mod. 307. Mich. 11 Geo. 1. 1725. The King v. Roberts.

(B) Matters between the Marshal and the Pri- [307] soners.

1. **I**T was moved that plaintiff had brought escape against Sir J. L. the Marshal, and had got judgment and execution, but Sir J. L. not attending the Court as he ought, plaintiff could not take him upon the execution; and if he were present, he doubted if he might take him, for fear the *taking him* would be an *escape of the prisoners* committed to him, and therefore prayed that Sir J. Lenthall might be put out of his place of Marshal, that so he might take him in execution. Per Glyn Ch. J. this is very mischievous, let Sir J. shew cause Friday next why he should not pay the money. Sty. 475. Mich. 1655. B. R. Plummer v. Sir John Lenthall.

2. Marshal may take a *bond to be a true prisoner*, but not to receive or take any thing of advantage to himself, and if he did, the bond was void at common law. Per Holt Ch. J. says it was so adjudged in the Case of Lenthall v. Cooke. 2 Salk. 438. Mich. 9 W. 3. B. R. Anon.

3. A *scire facias* was brought against the bail, and a *breach assigned* in this, that the defendant had *not rendered himself prisoner Mar' Maresch' Domini Regis*; Mr. King objected, that it was not good, without going on and saying, *coram ipso Rege existentis*; for the King has another Marshal, viz. the Marshal of the household. 2 Salk. 439. Mich. 1 Ann. B. R. Snow v. Firebrass.

(C) Matters between the Marshal and the Plaintiffs.

1. **I**T was agreed, that if a man occupies the office of Marshal, be it *by right or by wrong*, he shall be charged to the King and to the people, as Marshal, of escapes. Br. Forfeiture de terre. pl. 27. cites 39 H. 6. 32.

2. Payment to the Marshal is no *discharge* to the plaintiff at whose suit defendant was in execution, and the defendant may
2 Jo. 97.
S. C.

have remedy against the Marshal to recover his money again.
Per two Justices against one. 2 Mod. 214. Pasch. 29 Car. 2.
B. R. Taylor v. Baker.

The Marshal having suffered an escape, there was a judgment against him for 18000l. and a motion was made in the creditor's behalf to sequester the profits of the King's

Bench prison towards payment of the said debt; but this was opposed by the assignees of Boulter's mortgage [mentioned in the act Inf. f. 19.], because there was yet due to them 14000 l. for principal and interest, and that if the plaintiff would discharge the debt, he might take the profits of the prison to satisfy his debt. Whereupon it was moved, that an account might be taken of what was due on that mortgage at the time that act was made; for it extends to no further sum than what was then due, and what profits were received by the assignees, or might have been received by them without wilful default, and the same was granted accordingly. 8 Mod. 3. 50. Pasch. 11 Geo. 1. 1726. Wilson v. Machin.

[308] S. 3. If the Marshal or Warden, or their deputies, sue forth any writ of error in any action of escape, such Marshal or Warden &c. shall put in special bail.

S. 4. If any Marshal &c. shall take any reward or security to permit any escape, and shall be convicted, the said Marshal &c. shall forfeit 500l. and his office, and be for ever incapable of executing such office.

S. 8. If the Marshal &c. shall, after one day's notice in writing, refuse to shew any prisoner in execution to the creditor at whose suit such prisoner was charged, or to his attorney, such refusal shall be adjudged an escape.

S. 9. If any person desiring to charge any person with any action or execution shall desire to be informed by the Marshal &c. whether such person be a prisoner in his custody or not, the said Marshal &c. shall give a note thereof to the person requesting or his attorney upon demand at his office, or in default thereof shall forfeit 50l. and if such Marshal &c. give a note that such person is an actual prisoner in his custody, such note shall be sufficient evidence that such person was a prisoner.

S. 11. Office of Marshal and Warden of the King's Bench and Fleet shall be executed by those who have the inheritance of the said prisons, or by their deputies, for whom the Marshal and Warden to be answerable &c. and the profits and inheritances of the said several offices shall be sequestered, seized, or extended to make satisfaction for such forfeitures, escapes and misdemeanors respectively, as if permitted, suffered, or committed by the person or persons themselves, or either of them, in whom the respective inheritances of the said prisons shall then be.

S. 16. The

S. 16. The penalties in this act not particularly disposed of shall go one half to his Majesty, and the other half to him that will sue for the same.

S. 19. Nothing in this act shall lessen any security for money made out of the office of Marshal of King's Bench by William Lenthall Esq; to Sir John Cutler, or to Edmund * Boulter Esq. executor of Sir John Cutler, or to subject the said office, or the persons in whom the same shall be vested, to any of the forfeitures in this act contained, other than such as they are liable to before, until such money be paid.

* See the note on pl. 3.

Master and Servant.

(A) Master and Servant. With respect to others. Master chargeable for what Act of Servant.

1. **K**ING E. 6. sold a quantity of lead to Renagre, and appointed the Ld. North, who was then Chancellor of his Court of Augmentations, to take bond for payment of the money. The Ld. North appointed one Benger, who was his clerk, to take the bond, which was done, who delivered it to the Lord, and he delivered it back again to his clerk, in order to send it to the clerk of the Court of Augmentations. Benger suppressed this bond; and it was the opinion of all the Judges of England, that the Lord North was chargeable to the King, because the possession of the bond by his servant, and by his order, was his own possession. 3 Mod. 323. cites Dy. 161. D. 161. pl. 45. Trin. 4 & 5 Ph. & M.

2. So where an Officer of the Customs made a deputy, who concealed the duties, and the master, being ignorant of the concealment, certified the Customs of that part of the revenue into the Exchequer upon oath, he was adjudged to be answerable for this concealment of his servant. 3 Mod. 323. per Cur. in Case of Boson v. Sandford cites Dy. 238. b. D. 258. b. pl. 38. Pasch. 7 Eliz. [309]

3. So where the lessor was bound that the lessee should quietly enjoy, and it was found that his servant by his command, and he being present, entered, this was held to be a breach of the condition; for the master was the principal trespassor. 3 Mod. 323. ut sup. cites 4 Le. 123. 4 Le. 123. pl. 249. Mich. 31 Eliz. C. B. Seaman v. Browning.

(A. 2) Master and Servant, with respect to others.
Master chargeable *for what Debts* contracted by
Servant.

1. **T**HE *bailiff known* pawns an ox for corn which comes to the master's use, and agreed, that if he does not pay so much for the corn such a day, that the pawnee should keep the ox. The master cannot re-take the ox if the money is not paid. Arg. Pl. C. 11. b. cites 27 Aff. pl. 5.

So it seems where my servant is authorised to buy stuff to my use. Br. Contract &c. pl. 40.

2. If buyer, surveyor, or clerk of the market *buys stuff to the use of the King*, debt lies not against him, by award; but shall sue to the King, for he is debtor; *but* it was agreed that *if he receives money* of the King after *upon his account* for this debt, then he is debtor; *quære*, inasmuch as *he was not debtor at first*; nevertheless it seems that action of account lies against him. Br. Contract &c. pl. 40. cites 11 H. 4. 28.

* So it is in all the editions, but the year book is only notice given &c.) and says not to whom.

3. In debt if a man *sends his servant to buy* certain goods, or *his factor*, or attorney to buy merchandize for him, and he buys &c. the master shall be charged, *tho' the goods never come to his hands and tho' the master has no notice of it*; and the master cannot countermand it without notice given to the * servant, attorney or factor; per Pigot and Fairfax. Br. Contract &c. pl. 24. cites 8 E. 4. 11.

4. If a purveyor, factor, or *servant makes contract for fat beasts* for a certain sum of money, and gives a note of the receipt of the beasts to the use of the sovereign, or master, and also by the same bill obliges himself for the payment at a day certain, but does not seal the bill; this is no such contract as will charge the purveyor or servant by action of debt counting upon a buying, but action upon the case will serve in this case upon an assumpsit. D. 230. b. pl. 56. Trin. 6 Eliz. Alford v. Eglesfield.

But if a master forbids a tradesman to deliver any wares unless his servant pays for them, in such case, if

5. The master delivered money to his servant to provide victuals; the servant buys them in his master's name, but did not pay for them; an action was brought against the master, who would have waged his law, but the Court held he could not safely do it, because the victuals came to his use, and therefore he is chargeable, and must take his remedy against his servant. Brownl. 64. Pasch. 11 Jac. Sir H. Dockwray's Case.

the tradesman delivers wares, the master may safely wage his law. Brownl. 64. cites it as adjudged in Sir Henry Compton's Case.

6. Contract of servant may enure to the disadvantage of the master, and it may enure to his advantage; but in both cases master must agree, per two J. 2 Roll. R. 270. Hill. 20 Jac. B. R. Truswell v. Middleton.—And it must be pleaded specially. Ibid.

7. If my *bailly of my manor buy cattel to stock my ground*, I shall be chargeable in an action of debt; and if my bailiff sell corn or cattel, I shall have an action of debt for the money; for *whatsoever comes within the compass of the servant's service*, I shall be chargeable with, and likewise shall have advantage of the same; per Doderidge J. Godb. 361. Trin. 21 Jac. B. R. in Case of Seignior v. Walmer.

8. If I give my servant money and he buyes on trust, I shall not answer for what he buyes on trust; but if I send sometimes on trust, or pay scores, I shall answer; per Wild J. 3 Keb. 625. Pasch. 28 Car. 2. B. R. April 17. Southby v. Wiseman.

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The Case was, the defendant intrusted his servant to buy provi-

sions and paid every Saturday-night upon the servant's note; per Cur. the defendant is to be charged; for he was debtor all the week long; but if he had always given money beforehand for the week, it had been otherwise; and judgment for the plaintiff, nisi. Ibid. 630. April 25. S. C.

9. A merchant in the country has a factor in London, and sends up to his factor to buy several goods to send to his correspondent beyond sea; the factor buys goods of several persons, and then becomes insolvent, and actions are brought against this merchant for those goods; and the jury found a verdict for the defendant upon this diversity, viz. where the merchant orders his factor to buy goods of any particular person, there the merchant is debtor, and not the factor; but where he gives a general order to buy goods, there the factor is debtor, and not the merchant; BUCKLEY's Case when Pemberton was Ch. J. upon a trial at Nisi Prius in London by a jury of merchants. 2 L. P. R. 194.

10. If a servant usually employ'd to pawn goods for his master, or to borrow money for him, borrows of me, or pawns his master's goods to me for money, I shall maintain debt against the master thereupon; per Holt Ch. J. 12 Mod. 564. Mich. 13 W. 3. at Nisi Prius.

11. Master used to give his servant money every Saturday to defray the charges of the foregoing week; the servant kept the money; yet by Holt Ch. J. the master is liable. 3 Salk. 234. Sir Robert Weyland's Case.

So where a servant usually buys for his master upon tick, and takes up

things in his master's name but for his own use, the master is liable; but not where the master usually gives him ready money; per Holt. 3 Salk. 234. Pasch. 9 W. 3. B. R. Boulton v. Arlesden.—Cumb. 451. S. P.—Show. 95. Anon. S. P.—But where the master gives the servant money to buy goods for him, and he converts it to his own use, and buys the goods upon tick, yet the master is liable; so as the goods come to the master's use, otherwise not. 3 Salk. 234.—Cum. 451. Boulton v. Hellefden S. P. per Holt Ch. J. cites it as Sir Robert Wiseman's Case.—2 Vern. 643. Speering v. Degrave, Galway & al. S. P.

12. A note under the hand of apprentice shall bind his master where he is allowed to deliver out notes, tho' the money is never applyed to the master's use. 3 Salk. 235.

But where he is not allowed or a custom'd to deliver

out notes, there his note shall not bind the master, unless the money is applyed to the master's use; per Holt. 3 Salk. 235. in Case of BOULTON v. ARLESDEN.—Or the master consents afterwards. Cumb. 450. Boulton v. Hillefden.

(B) Master chargeable for what *Damage* done by the Servant.

1. **I** F I command my servant to disseise J. S. and he disseises him *with force*, I shall be *attainted of the felony*; otherwise where the assent is only subsequent. Arg. 2 Roll. R. 27. cites 2 H. 7. 17.

But if the servant abuses the distress, the servant himself shall answer for it. Arg. Hard. 31.—

2. If the lord *distraints* his tenant by his servant, and the master *converts the distress* to his own use, the master shall be punished and the servant not; and if the *servant converts* the distress to his own use, he shall be punished and not the master; because the commandment of the master was lawful. Kelw. 89. b. pl. 12. Hill. 22 H. 7.

Where a servant takes a sheep for an amercement and the master *agrees* he is equally liable to trespass as the servant, and both are liable. Clayt. 5. cites 9 Car. 1. Water's Case.

[311] 3. If I have a servant who is my merchant and he goes to the fair with an *unsound horse*, or other merchandizes, and sells them, the vendee can have no action against me; but per Martin, if I command him to sell the horse to any *particular person in certain*, it seems otherwise. Arg. Bridgm. 128. cites Doctor and Student 138.

As where owner of a ship fitted her out to sea with letters of marque, to take the goods of

4. Where a master sends his servant to do an *unlawful act*, he shall answer for him if he *mistakes in doing the act*; but where he sends him to do a *lawful act*, there, if he mistakes, the master shall not answer; per Popham Ch J, Mo. 776. Pasch. 3 Jac. Waltham v. Mulgar.

the Spaniards, who were then enemies to the Queen; and the sailors against his direction took a French ship, the French then being in alliance with us; and thereupon they sued in the Court of Admiralty, for restitution of their goods. Moor. 776. Pasch. 3 Jac. Waltham Mulgar.—
* S. P. Mo. 786. Mich. 4 Jac. Lady Russell v. Earl of Nottingham.—S. P. Poph. 143. Arg. cites 11 E. 4. 6.—2 Roll. R. 27. Arg. S. P.

5. A. and B. affirming themselves to be servants to the deputy aulneger unpacked a parcel of drapery belonging to J. S. pretending to search for certain stuffs called new drapery, and laid it in the dirt, whereby the goods became unsaleable. It was agreed that if they *as servants* to the deputy *without his precedent appointment* do seize the plaintiff's goods, and their master *approves* the seizure, tho' they *without his consent abuse the goods*, yet their master is a *trespassor ab initio*. And tho' the first seizure be admitted lawful, yet the abusing makes the original seizure wrongful, and trespass lies; and tho' the master did not appoint or was privy to the abuse, yet he shall answer damages. Lanc. 90 Hill. 8 Jac. in the Exchequer. Gibson's Case.

Vent. 295. S. C. but no mention is

6. Servant driving unruly horses in Lincoln's-Inn Fields to break them for the coach hurt a man passing by, and case is brought

brought against master (tho' absent) and servant, and held good; for it shall be *intended* that the master sent the servant to train the horses. 2 Lev. 172. Trin. 28 Car. 2. B. R. Michel v. Allestree. made there of the master.

7. If I *command* my servants to *do a lawful act*, as in this case to pull down a little wooden house (wherein the plaintiff was and would not come out, and which was carried upon wheels into the land to trick the defendant out of possession) and bid them take care they hurt not the plaintiff; but in doing this my servants wound the plaintiff; in trespass of assault and wounding I may plead not guilty, and give this in evidence; for that I was not guilty of the wounding, and the pulling down the house was a lawful act; per three J. Skin. 228. Hill. 36 & 37 Car. 2. B. R. Kingston v. Booth.

8. The reason why a principal shall answer for his deputy is, because as he as principal has power to put him in, so he has power to put him out, without shewing any cause; and that, tho' he had expressly given him an *estate for life* in the deputation; per Holt Ch. J. 12 Mod. 488, 489. and cites Hob. 13. and Mo. 856. 39 H. 6. 34.

9. Tho' I am not bound by the act of a stranger in any case, yet if my servant doth any thing prejudicial to another it shall bind me, where it may be presumed he acts by my authority being about my business; per Holt Ch. J. Cumb. 459. Mich. 9 W. 3. B. R. in Case of Turberville v. Stamp.

10. No master is chargeable with the acts of his servant but when he ** acts in execution of the authority given by his master*, and then the act of the servant is the act of the master. 1 Salk. 282. Mich. 10 W. 3. Middleton v. Fowler. So that the master of a stagecoach is not chargeable for goods lost

by the driver, unless the master takes a price for the carriage of the goods. 1 Salk. 282. —

* Bridgm. 128. Arg. S. P. and judgment accordingly, in Case of Southern v. How. — Brownl. 176. Hinde v. Wainman S. P.

11. In an action on the case for a deceit the plaintiff set forth, that he bought several parcels of silk for silk, whereas it was another kind of silk; and that the defendant well knowing this deceit sold it him for silk. On trial it appeared that there was no actual deceit in the defendant who was the merchant, but that it was in his factor beyond sea; and the doubt was, if this deceit could charge the merchant? And Holt Ch. J. was of opinion, that the merchant was answerable for the deceit of his factor, tho' not criminaliter, yet civiliter; for seeing somebody must be a loser by this deceit, it is more reason that he who employs and puts a trust and confidence in the deceiver should be a loser than a stranger; and thereupon the plaintiff had a verdict. 1 Salk. 289. coram Holt Ch. J. at Nisi Prius. Hern v. Nichols. [312]

12. Master is liable for the neglect of his servant, but not for the ** wilful wrong* of him. 2 Salk. 441. Mich. 10 W. 3. Jones v. Hart. * As if my servant contrary to my will chase my + cattle

into another's soil, I shall not be punished: otherwise it is where my cattle escape into another's soil. Br. Trespas, pl. 435, cites 13 H. 7. 15. — S. P. For he does this of his own wrong without any

any such warrant from me. Arg. Poph. 143. cites S. C.—For by the voluntary putting in of the beasts there without my assent he gains a *special property for the time*, and to this purpose they are his beasts. See Trespass (Q) pl. 1. cites 12 H. 7. Kell. 3. b.—+ S. P. Arg. Hard. 31.—So if he takes toll where none is due. Ibid. cites 44 E. 3. 20.—Or sets a dog on to bite a man. Ibid. cites 13 H. 7. 15. D. 29. a.

(C) Master. *Who shall be said a Master to be chargeable.*

1. *Bailiffs of a sheriff served an execution in breach of an injunction*, and finding money hid in the house carried it away; the plaintiff at law was ordered to make satisfaction; per Lord North in affirmance of an order by Lord Nottingham. Vern. 207. Mich. 1683. Childerns v. Saxby.

3 Mod. 321.

S. C.—

Show. 102.

S. C. & P.

2. *Whoever employs another* is answerable for him, and undertakes for his care to all that make use of him. 2 Salk. 440. Mich. 1 W. & M. D. R. in Case of Boson v. Sandford.

(D) Master. *Bound by what Acts, or Consent of Servant.*

Br. Contract &c. pl. 21.

cites S. C.

—And if he

pledges the

beasts of his

master for corn which comes to the use of his master, this is good; and trespass does not lie for the master, nor can he retake them; and because he retook, therefore the other recovered against the master by writ of trespass. Br. Trespass, pl. 245. cites 27 Aff. 5.—Br. Contract &c. pl. 21. cites S. C.—Br. Pledges, pl. 16. cites S. C.

So where

the servant

promiseth

for the

master, that

the master shall forbear to sue &c. and shall by such a day deliver to the defendant the obligation, &c. and the defendant promised to pay the money at such a day; and the master having notice thereof agreeth to it, it is now the promise of the master ab initio, for it is included in his authority that he should agree, compound &c. and he hath power to make a promise; per Doderidge J. Godb. 361. Trin. 21 Jac. B. R. in Case of Seignior v. Wolmer.

2. An assumpsit of the servant by the appointment of the master, shall bind the master, and is his assumpsit. Godb. 361. Trin. 21 Jac. B. R. Seignior v. Wolmer.—Cites 27 Aff.

3. If a servant of a mercer, draper, taverner, and such like, who have authority to sell those goods of his masters, gives me

silks, cloth, or wine, it is good; for he has authority to sell. Br. Trespass, pl. 295. cites 2 E. 4. 4.

but Brooke

makes a

quære and

says, authority to sell is no authority to give.—Contrary of the gift of another servant * who is not appointed to sell. Br. Trespass, pl. 295. cites 2 E. 4. 4.—* As a shepherd &c. Br. Contract &c. pl. 38. cites S. C.

4. An ejectment brought for the manor of P. It was held per Cur. that the consent of the servant in the absence of him that is possessed of the term, shall not oust his master of the possession; because

Br. Contract &c. pl. 38.

cites S. C.

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4. An ejectment brought for the manor of P. It was held per Cur. that the consent of the servant in the absence of him that is possessed of the term, shall not oust his master of the possession; because

cause

cause the servant has no interest in the land. Brownl. 133. Pasch. 7. Jac. Mason v. Stretchor.

5. If a servant *selleth* a horse with warranty it is the sale and contract of the master, but it is the warranty of the servant, unless the master giveth him authority to warrant it; for a warranty is void which is not made and annexed to the contract, but there it is the warranty of the servant, and the contract of the master; but if the master do * agree unto it after, it shall be said that he did agree to it ab initio; per Doderidge J. Godb. 361. Trin. 21 Jac. B. R. in Case of Seignior v. Wolmer.

S. P. and because it is the warranty of the servant it is not good; per Doderidge and Haughton J. 2 Roll. 270. in Case of Truswell v.

Middleton, cites 11 E. 4. — * As where a servant doth a disseisin to the use of his master, the master not knowing of it, and then the servant makes a lease for years, and then the master agrees, the master shall not avoid the lease for years; for now he is in by reason of his agreement, ab initio; per Doderidge J. Godb. 361. Trin. 21 Jac. B. R. in Case of Seignior v. Wolmer.

6. Debtor of the master promises the servant, if he will discharge the debt due to the master, that he will expend double the sum for the benefit of the servant (the plaintiff); adjudged an illegal consideration; for a servant cannot discharge a debt due to the master. 2 Lev. 161. Hill. 27 & 28 Car. 2. B. R. Harvey v. Gibbons.

7. A. sent his servant to receive a 50l. note of B. — B. went with the servant to C's shop, who indorsed off 50l. from a note B. had upon him, and gave A's servant a note of 50l. upon D. a goldsmith. The next day the servant carried the note to D. — D. refused payment, and that day broke. Upon this the note was sent back to C. who refused payment; whereupon the action was brought. It was held per Cur. 1. that this was money * received by C. and 2. that the act of a servant shall not bind his master unless he acts by authority of his master; and therefore if a master sends his servant to receive money, and the servant instead of money takes a bill, and the master, as soon as told thereof, disagrees, he is not bound by this payment. But acquiescence, or any small matter, will be proof of the master's consent, and that will make the act of the servant the act of the master. 2 Salk. 442. Hill. 2 Annæ. B. R. Ward v. Evans.

6 Mod. 36. Mich. 2. Ann. B. R. S. C. — * C. became a receiver to the use of A. 11 Mod. 72. Pasch. 5. Ann. B. R. in Case of Thorold v. Smith.

8. J. S. being indebted to A. in 100l. A. sent his servant to receive the money, who takes a note of a goldsmith upon J. S. and gives a receipt for the money; J. S. breaks within a week after; it was insisted, that the servant had no authority to receive any thing but money, and consequently could not discharge the debt upon receiving the bill; and of this opinion Holt Ch. J. and Powel J. seemed to be, but that if the servant had at other times received bills for his master, it would be an authority to this purpose; but that this was proper matter of evidence, being the constant practice of the world, and that upon A's asking his servant what was done, and he telling him he had received such a note, it is a strong presumption that A. approved of it, or else that he would have sent it back again. And Holt at another day proposed a new trial, whether the servant had power to receive a bill and give a receipt? And this was agreed to; and he said, that

S. C. Holt's Rep. 462, 465. reported, not as out of any other book.

in

in this case the receipt of a servant that has power, is the receipt of the master. 11 Mod. 71. Pasch. 5 Ann. and *ibid.* 87. Trin. 5 Ann. B. R. Sir Ch. Thorold v. Smith.

In this Case were cited the Case of *WARD v. EVANS*, and *HANKEY v. WATTS*,

and the difference was observed be-

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tween them, that in those cases nothing came to the master's use as in this case the notes did; and that in some of those cases there was a prior debt, which there was not in the present case.

And the

Case of *MONK and CLAYTON* was also cited, where the act of a servant, though out of place bound his master by reason of the former credit given him in his master's service, the other not knowing that he was discharged. *Ibid.* 110, 111.—For a servant by transacting affairs for his master derives a general authority and credit from him, which cannot be determined for a time by any particular orders or instructions; for none but the master and servant can be privy to them, and so there could be no dealing with any but the master. 10 Mod. 110. Mich. 11 Ann. B. R. in Case of *Nickson v. Brohan*.

9. A. sent his servant (who had been used to transact affairs of that nature for him) on Saturday morning with a note drawn on C. with orders to get from C. either bank-bills or money and turn them into exchequer notes; but the servant having other business of his master's, and to save the going to C. goes to B. and gets of him a bank bill for C's note, and invested it in exchequer notes, which he brought to A. not letting him know but that he had gone to C. Upon the Monday following C failed; the question was, whether B. or A. should bear the loss? Parker Ch. J. who tried the cause was first of opinion that the loss should fall upon B. because the servant acted directly contrary to his master's orders; and B. by furnishing the servant with a bank bill, did the master no service at all; for had B. not done it, the servant must in obedience to A's orders have gone and received the money himself from C. and cited the Case of *WARD v. EVANS* [supra]; but one of the jury informing his Lordship that he took the practice to be otherwise, because, whether a servant, who was used to act upon the credit of his master, went against the orders of his master or not, was a fact which could not be known to a third person. His Lordship quitted his opinion; and the matter being afterwards moved in B. R. by his direction, the Court were all of opinion that the master was chargeable, and he only. 10 Mod. 109. at Nisi Prius, Guildhall; and Mich. 11 Ann. B. R. *Nickson v. Brohan*.

10. An owner of land was bound by the agreement of his bailiff for inclosing a common, he having acquiesced for 30 years. M. S. Tab. cites March 1720. *Tuiston v. Wentworth*.

(E) What Act of the Servant shall be said the Act of the Master.

1. **D**elivery by the servant, by the order and in the presence of the master, of money &c. to another person is the delivery of the master, and not of the servant; per two Justices against one, and one doubting. Cro. J. 614. Trin. 40 Eliz. B. R. *Hewer v. Bartholomew*.

2. Upon evidence the case was thus; A. had three several closes, 1st. arable, 2d. pasture, 3d. meadow; B. pretends a right to all, and enters, and makes a lease of all to try the title.

The

The servants of A. with carts about their master's business enter into one of the closes; and by the Court that is an ejectment of all, altho' there be *not any proof of the command by their master*. Noy. 77. Trin. 22 Jac. B. R. Cally v. Fish.

3. A servant had power to draw bills of exchange in his master's name, and after is turned out of the service; per Holt, if he draws a bill in so little time after, that the world cannot take notice of his being out of service, or if he were a long time out of his service, but that kept so secret that the world cannot take notice of it, the bill in those cases shall bind the master. 12 Mod. 346. Mich. 11 W. 3. v. Harrison.

4. M. Mildmay agent to the York Buildings Company, residing in Scotland, drew a bill of exchange in favour of J. S. on their cashier in London, which bill run thus: To J. B. Cashier to the Honourable Governor and Assistants of the York Buildings Company at their house in Winchester-street. Sir, pray pay to J. S. or his order 200l. and place it to the account of the Company for value received as per advice by your humble servant Charles Mildmay. The letter of advice referred to was directed to the Governor and Company informing them of the draught he had made upon Mr. J. B. in favour of J. S. (but it did not appear to be the usual method of drawing bills on the Company; J. B. accepted the bill generally, viz. Accepted by J. B. And if this acceptance should charge him in his own right? was the question; which was saved for the judgment of the Court, after a verdict at Nisi Prius for the plaintiff; and it was resolved it should. 3 New. Abr. 563. cites Mich. 7 Geo. 2. in B. R. Thomas v. Bishop.

(F) Servant. Chargeable in what Cases of Contract [315]
by him.

1. Servant retains one to work for his master in husbandry; debt does not lie against the servant upon this retainer. Arg. 2 Roll. 77. cites 3 E. 4.

2. So if one retain a carpenter for his master, to build a house for him, debt lies not against the servant; for the retainer was for his master, and it is in law the retainer of his master. Ibid. cites 9 Rep. 8.

house for his master, there debt lies against the servant; for the retainer was general; per Haughton J. quod fuit concessum; and he thinks, if the record of Simpson's Case was seen, that the retainer was general. 2 Roll. R. 77. Hill. 16 Jac. B. R. in Case of Woodhouse v Bradford.

3. Master sends his servant to a shop to buy goods, and he buys for his master, and makes not the contract in his own name. Per Richardson Ch. J. and not denied, that the master shall be charged and not the servant. Litt. R. 374. Trin. 7 Car. C. B. Anon. cites 11 E. 4. 6.

Het. 163. S. C.—
If the servant does not expressly promise payment, and

the goods come to the master's use. D. 230. b. Marg. cites Mich. 6 Jac. B. R. Goodbaylie's Case.

4. If

4. If a master *always gives his servant money to buy his markets with*, it is good evidence to discharge the master in an action brought against him for goods taken upon trust by that servant. Per Glyn Ch. J. Trial per Pais 181. Mich. 1658 at Guildhall. Sir Thomas Rouse's Case.

Abr. Equ. Cases 338, 339. S. C. — The Case was, that A. had recovered at law in an indebitatus assumpsit for the goods, against which B. brought a bill, to be relieved, surmising that it was for goods sold to B. as he was master of the buck bounds to King James II. and that the

goods were for the King's servants; and that it was the King's debt and not B's, and what he asked was in relation to his office, and not as a private person; and that A. was to expect his money from the King, and not from B. The defendant pleaded the verdict and judgment &c. and demurred, which was over-ruled, and A. ordered to answer. 2 Vern. 146. Trin. 1690. Graham v. Stamper.

5. B. a servant was prevailed upon to bespeak things for his master at A's shop, which he did accordingly, *and took up things of A. for his own use also*; what A. sold on the master's account was regularly paid, except once at last, but *what B. bought on his own account was not accounted for in four years, and the accounts were kept separate as to what was for the master, and what for B. and what monies had been paid as for the master's goods were always paid out of a particular fund*. The Court seemed to think that a servant's bespeaking or fetching goods *without any particular promise of paying for them*, does not render him liable to pay for them. Trevor said it was a case of great consequence, but of very little doubt; but because of the noise and discourse that had been made about it, they ordered a master to state it on the books, answers, proofs, and pleadings, and then they would give direction for how much execution should be taken out upon the judgment which had been obtained against B. at law for the whole, and against which he came hither for relief. Trin. 1692. Ch. Prec. 45. Graham v. Stamper.

[316] (G) Servant. Chargeable for what *Damage done by him*.

1. **I**N debt upon *bond* against executors, conditioned for *quiet enjoyment* of lands sold by the testator to the plaintiff; the breach assigned was, that the testator had entered and cut down five trees, upon which they were at issue, and the jury found, that the testator's *servant by his command* entered and cut &c. *in his said master's presence*. The Court held, that the condition was broken, and that the master was the principal trespasser. Le. 157. pl. 223. and 4 Le. 123. pl. 299. S. C. Mich. 31 Eliz. C. B. Seaman v. Browning.

2. A servant *takes sheep by command of his master* (who supposed he had a property in them), *and puts them into his master's grounds*, and J. S. claiming a property in them also demanded the sheep of the servant, and upon his refusal to deliver them, J. S. brought trover against the servant. As to this it was resolv'd, that the action will not lie against the servant; for it being in obedience to his master's commands, the servant shall be excus'd, tho' the master had no title. And Scroggs J. said, that this rule will extend to all cases, where the master's *command is not*

not to do an apparent wrong. For if the master's case depended upon a title, be it true or not, it is enough to excuse the servant; and it would be mischievous, if the servant upon all occasions must be satisfied of his master's right and title before he obey his commands. 2 Mod. 242. Trin. 29 Car. 2. C. B. Mires v. Solebay.

3. The *warrant* of no man, not even of the King himself, can excuse the doing an *illegal act*; for though the commanders are trespassers, so also are the persons that do the fact. 3 Lev. 352. Arg. in Case of Sands v. Child.

4. A servant or deputy, quatenus such, cannot be charged for *neglect*, but the principal only shall be charged for it; but for a *misfeasance*, an action will lie against a servant or deputy, but not quatenus a deputy or servant, but *as a wrong doer*; per Holt Ch. J. 12 Mod. 488. Paich. 13 W. 3. in Case of Lane v. Cotton.

As if a bailiff, who has a warrant from the sheriff to execute a writ, suffer his prisoner by neglect

to escape, the sheriff shall be charged for it, and not the bailiff; but if the bailiff turn the prisoner loose, the action may be brought against the bailiff himself, for then he is a kind of a wrong-doer or rescuer, and it will lie against any other that will rescue in like manner; and for this diversity cites 1 Le. 146. Cro. 175. 142. 41 Ed. 3. 12. 1 Roll. 78. which is not well reported, but the inference may be well made from it. Per Holt Ch. J. 12 Mod. 488. and cited the above books.

5. A sea captain in the African Company's service seized a ship trading on the coast of Guinea. She was condemned as prize, and her cargo accounted for to the company. 19 years afterwards a freighter brought trover against the executor of the captain, and recovered 2500 l. damages. The executor brought a bill against the freighter and the company, but was dismissed as to the freighter, because the executor might have defended himself at law; but the company was decreed to *indemnify the executor, and the freighter to prosecute the decree in the executor's name.* And tho' the captain had received 700 l. for his service from the company, yet the executor was *not to refund or abate*, that being only *a gratuity to him*, he acting only as their servant or agent, and the quantum of the damage must be the same as was recovered against the executor at law, because they might have defended the trial. Trin. 1703. Ch. Prec. 221. Langdon executor of Dickinson v. the African Company and Dockwray.

(H) *What is lawful to be done by the one for the other.* [317]

1. A Servant may justify in defence of his master. But he cannot justify a *battery in defence* of the goods of his master; per Powel J. 2 Lutw. 1483. Hill. 11 W. 3. Shingleton v. Smith.

See Maintenance (K) (L). Master can not justify battery in defence of his servant, tho' servant may

in defence of his master. Arg. 2 Roll. R. 137.

(I) *Compellible to serve. Who. And who shall be said Labourers within the Statute.*

1. **I**N false imprisonment the defendant justified, because the plaintiff was vagrant, and J. N. complained for want of a servant, and he required him to serve, and he would not, by which he put him into the stocks &c. and the plaintiff said, that he had a house and two acres of land and chattels, five sheep, 10 cows &c. to the value of 20 l. to be occupied, judgment &c. and the defendant said that he had only one cow, and no land, and so not sufficient to be occupied, and the other that he had sufficient chattels to be occupied, Prist, and the others e contra. Br. Laborers, pl. 14. cites 47 E. 3. 18.

S. P. Br. Laborers, pl. 10. cites 46 E. 3. 14. — Action upon the statute of labourers does not lie against a

chaplain; per Cur. for it is intended that he has wherewithal to live upon, and is not always disposed to celebrate divine service. Ibid. pl. 47. cites 10 H. 6. 8.

3. If a carpenter be retained to make a house, action upon the statute of labourers lies against him if he does not do it; for he is an artificer. Br. Laborers, pl. 3. cites 2 H. 4. 3.

4. Action was brought upon the statute of labourers against a little girl of the age of 10 years upon retainer and departure, and the plaintiff counted against her; and the defendant said, that she is not of the age of 10 years, judgment &c. And because it appeared to the Court by inspection, that she was not of the age to make a covenant, therefore the writ abated by award; for per Rickhill, she is not of age to bind herself by covenant ante annos nubile, viz. 12 years; quod nota. Br. Laborers, pl. 19. cites 2 H. 4. 18.

Infant or some of the age of 12 years shall be bound by their covenant to serve in husbandry. Br. La-

borers, pl. 51. cites F. N. B. fol. 168. — S. P. But where an infant of 10 years old was sued upon the statute he was discharged of the action; yet per Hankford, a writ lies against a stranger that takes him. Ha. F. N. B. [168] (D) in the Notes (b) cites 2 H. 4. 18.

5. Action upon the statute of labourers anno 23 E. 3. 1. which is, that *whoever is able in body ought to serve*; and per Hank, an infant of 12 years retained ought to serve, and yet issue was taken if the infant was of the age of 12 years only at the time of his departure out of service or not; quod nota. Br. Laborers, pl. 20. cites 7 H. 4. 5.

6. Receiver takes 40s. per ann. brought action thereof; the [318] defendant demurr'd, because it is more than is given by the statute of labourers, et non allocatur; the reason is, because it is out of the statute, as it seems. Br. Laborers, pl. 50. cites 11 H. 6. 10.

7. One

7. One may be *constrained* by the statute to serve, but not to be an apprentice. Br. Laborers, pl. 30. cites 21 H. 6. 33.

And if a man be retained in service, and

goes wandering abroad out of his service, another man may compel him to serve him &c. because he is out of service. F. N. B. [168.] (C).

8. Artificer, carpenter, taylor, shoemaker &c. shall not be compelled to serve by the statute of husbandry; contrary of servants of husbandry, and therefore of the salary of the one the master may wage his law, contrary of the other. Br. Laborers, pl. 38. cites 36 H. 6. 14.

But if a carpenter, taylor, shoemaker, or such like artificer will be retained in service, and

departs, action lies of the departure, tho' they shall not be compelled to serve; for the first article of the statute of labourers compels servants of husbandry to serve, and the 2d article is, that if any retained in service depart, action shall lie of the departure. Br. Laborers, pl. 36. cites 38 H. 6. 14.

9. A servant shall be compelled to serve in summer in the place where he served in the winter before, and * Lords of vills, and Justices of Peace may command vagrants to prison who will not serve. Br. Laborers, pl. 51. cites F. N. B. 168.

F. N. B. [168] (A) and see the writ there to that purpose.

* S. P. and may command the gaoler to set him at liberty without any other writ. F. N. B. (B).

10. He, who has not sufficient lands of his own to occupy, shall be compelled to serve. F. N. B. [168.] (I).

11. Baron and feme shall be bound by their covenant to serve. Br. Laborers, pl. 51. cites F. N. B. fol. 168.

12. A gentleman by his covenant shall be bound to serve, tho' he were not compellable. And an action will lie against them for departing from their service, by reason of the covenant. F. N. B. [168.] (E).

So of a chaplain, carpenter, &c. Ibid.—But the count ought to be

special. Ibid. in the notes there (c) cites 11 H. 4. 33.

13. By 5 Eliz. cap. 4. s. 4. Every person unmarried, or under the age of 30 years tho' married, having been brought up in any of the arts mentioned in this act by the space of 3 years, and not worth in lands 40s. per ann. or in goods 10l. and so allowed under the hands and seals of two justices of peace, the head officer, or two discreet burghesses of the place where the party so brought up hath lived by the space of one whole year, not already retained in husbandry, the arts above-said, or any other art or mystery, or in any service upon request of any person using the same art, shall not refuse to serve for the wages limited by the statute; and being so retained, shall not depart from his or their service without one quarters warning before two lawful witnesses, or some lawful cause to be proved before one justice of peace, or head officer, in pain of imprisonment without bail; but upon submission to perform the service, they shall be enlarged without fees; which commitment and enlargement two justices of peace, the head officer, or two burghesses as aforesaid, unto whom complaint shall be made, have power to command, as in their discretions upon due proof shall be thought fit.

8. 7. Every person between the age of 12 and 60 not already retained in any service, nor employed about husbandry, mines, glass, coal,

coal, fishing, sailing, provision of grain or meal for London, nor gentlemen born, nor scholar in any university or school, nor worth 40s. per ann. in lands, or 10l. in goods, nor having a father, mother or other ancestor (whose heir he is) worth 10l. per ann. in lands, or 40l. in goods, shall be compelled to serve in husbandry, and shall not depart that service, otherwise than as is before limited, upon pain above expressed.

[319] S. 24. Every unmarried woman, fit to serve, being above 12 years old, and under 40, shall by two justices of peace, a chief officer, or two burghesses, be compellable to serve for convenient time and wages, in pain of imprisonment.

(I. 2) Retainer. What within the Statute.

But where he is retained for one year, and continues for 8 or 10 years, now the first retainer shall serve for all, and is only one retainer, and is within the case of the statute for all the years. Ibid.

1. **R**etainer for one year and so from year to year taking for his salary as in the statute is a good retainer; and if he serves for 8 years upon such retainer he shall have action for his salary, and he cannot depart without reasonable warning. Br. Laborers, pl. 36. cites 38 H. 6. 14.

2. Retainer for 40 days, or to serve at all times when required, is no retainer according to the statute, but a covenant, if it be by deed; and without deed it is void. F. N. B. [168.] (F).

Co. Litt. 42. b.—Br. Laborers, pl. 51. cites S. C.

3. If a man retains one and says not for how long he shall serve him, he shall serve him for a year; for that is a retainer according to the statute. F. N. B. [168.] (H) cites 9 H. 6. 7. 11 H. 4. 44. 41 E. 3. 13. 27 E. 3. 22.

4. If one who is not to have any servant retains another to serve him &c. the retainer is void. F. N. B. [168.] (H).

Ibid. In the notes there

(d) says it is doubted, if a retainer for more than a year be within the statute, and cites 29 E. 3. 27.

6. A retainer by the wife is not within the statute. F. N. B. [168.] (Q).

(K) Inter se. Power of the Master over the Servant.

* I cannot take him out of his service without request made or seizing him. Br. Laborers,

pl. 29. cites 21 H. 6. 9.—Br. Action sur le Case, pl. 55. cites S. C.—Br. Notice, pl. 4. cites S. C.—If the servant be drawn away, the master may re-apprehend him, and keep him in spite of him. F. N. B. [168.] (P).

1. **W**HERE a man has a ward or * servant retained who departs from him, he cannot take them and bring them back by force, nor put his hands upon them to bring them back, but he may require them &c. and if they refuse he shall have his action, per Cur. Br. Trespass, pl. 225. cites 38 H. 6. 25.

2. In trespass it was doubted if the *master may strike his apprentice by way of correction*, or shall be put to writ of covenant; quære of correction of other servants within oge. Br. Trespals, pl. 349. cites 21 E. 4. 6.

A man may beat his apprentice for an offence as well in the vill where

he is apprentice as in another vill, *and may beat him twice for one and the same offence*; for it may be that the first beating is not sufficient for the offence; per Fairfax J. but Spilman e contra. Ibid. pl. 353. cites 21 E. 4. 53.

3. A man may keep his servant from going to a conventicle, or an alehouse; per two J. 2 Mod. 167. Hill. 28 & 29 Car. 2. C. B. Anon.

4. A steward had writings and evidences, and also a considerable sum of money in his trunk, which his lord seized upon pretence of the steward's being much indebted to him; but the Court ordered all to be restored; for tho' the defendant might be greatly indebted to his lord, yet *he cannot levy his own debt by seizing violently the goods of his steward*. Vern. 32, 33. Hill. 1688. Countess of Plymouth v. Bladon. [320]

5. A man may surely justify the *detaining of his servant that is taking away his goods*; per Cur. 2 Vern. 33. in Case of Countess of Plymouth v. Bladon.

(L) Discharge of Servant &c. from his Service. How, and what amounts to it, or shall be good Cause of Departure.

1. **T**H E master cannot discharge his servant within the time, unless he has *agreed to it*; no more than the servant can depart without the agreement of the master. Br. Labourers, pl. 27. cites 19 H. 6. 30.

2. Discharge of an *apprentice by parol* is not good; for he cannot be an apprentice but by writing, and therefore the discharge ought to be by writing. Br. Labourers, pl. 30. cites 21 H. 6. 33. *But a servant may be discharged by parol; as where the master says, that he shall serve him no longer; for he cannot serve against the will of his master; for if he serves him, the other shall find him meat and drink. But the servant shall have his salary for the time which he has serv'd.* Br. Labourers, pl. 38. cites 6 E. 4. 2.—S. P. Br. Conditions, pl. 144. cites 22 E. 4. 28.

3. *Battery by the master*, or licence of the master, are good causes for the servant to depart. Br. Labourers, pl. 51. cites F. N. B. 168. [168] (L). —So of battery by the

master's wife. F. N. B. [168] (Q).—Br. Labourers, pl. 51. S. P.

4. *Keeping a servant from meat and drink* is good cause of departure from his service. F. N. B. [168] (L) cites 39 E. 3. 22. and 6 E. 4. 2. Br. Labourers, pl. 51. S. P.

5. If a *feme servant marries*, yet it seems that she ought to serve. F. N. B. [168] (N). Ibid. in the notes there (a) says, see contra, per Cur. 11 H. 4. 13. that it is not lawful to take her during the espousals, and also cites 46 E. 3. Bar. 214. 7 R. 2. Trespals 206.

6. If *husband and wife are retain'd in service during their marriage, &c.* an action lies against them if they depart from their service. F. N. B. [168] (O) cites 46 E. 3. Bar. 214.

Because the first retainer was not according to the statute.

F. N. B. [168] (F).

7. If a man *retains a servant by 40 days*, and another retains him for a year within the 40 days, the first retainer is by this discharged. Br. Labourers, pl. 51. cites F. N. B. 168.

(M) Inter se. *Actions by the Master against the Servant, for neglecting or refusing to do his Service &c.*

1. **I** F one retain a servant for a year, and commands him to do his business, and he *refuse*, 'tis a good plea in action of debt for his salary for the master to say that he required him to *do his business*, and he refused; per Hales J. Mo. 10. pl. 36. Trin. 3 E. 6. Anon.

[321] 2. If a *special servant*, as a baily or a steward, *misbehave himself in a thing which belongs to his charge*; without any special trust, an *action sur case* lies. But a *general servant* is to do and execute all lawful commands, and against this general servant, if his master commands him to do such a thing, and he doth it not, an action on the case lieth, but yet this is with this diversity, *scilicet*, if the *master commands him to do what is conveniently in his power*, or otherwise not; and therefore if I command my servant to pay 100*l.* at York, and give him no money to hire a horse, an action lies not for his not doing this command, but if I furnish him with ability to do it, and he does it not, an action well lies against him; per Tanfield Ch. B. Lane 67. Trin. 7 Jac. in Case of Levison v. Kirk.

3. In *case by a carrier* against his servant for *losing goods &c.* exception was taken that this action lies not, except it *appear that the carrier had received damage by being sued*; for this action lies only in respect of the damage the master sustained, and cited Cro. El. 53. 461. Cro. Car. 187. contra. 'Twas further objected, that if this action lies, the defendant might be *twice charged*, i. e. *by the master and by the owner*. But Holt Ch. J. contra, unless there be an *actual conversion*; for the owner of the goods has an action against the servant only in case of a conversion. And the master has a special property and may maintain trover; and the master is liable to the owner, by reason he was intrusted by him. Besides there ought to be a *negligence shewn in the servant*, to make him liable to this action; for this *amounts only to a bailment of goods*, where if thieves break in and steal them, he shall not answer for it. And judgment nisi within three days. 11 Mod. 135. Trin. 6 Ann. B. R. Savage v. Walkew.

(M. 2) Inter se. Actions by the Master against the Servant for defrauding or stealing from him.

1. If butler or shepherd steal sheep or plate, this was felony at common law. But if one deliver a thing to his servant to bail over, and he esloign it, this is not felony, because he has special property on which he may maintain trespass on the taking out of his possession. Mo. 248. pl. 392.

The servant of a mercer &c. has neither general nor special property in the goods, and he shall

have no action of trespass if they are taken away; but if he take them trespass lies against him, and if he embezel them 'tis felony; per Anderson Ch. J. Goldsb. 72. Snagg v. Blofs. — Ow. 52. Mich. 29 & 30 Eliz. Blofs v. Holman.

2. 21 H. 8. cap. 7. s. 1. enacts, That servants to whom jewels, money or goods by their masters shall be delivered to keep, and withdrawing with the said jewels &c. to the intent to steal the same, or embezzling the same with a purpose to steal, to the value of 40 s. shall be guilty of felony.

Made perpetual, by 5 Eliz. cap. 24

S. 2. Provided that this act extend not to any apprentice, or any person within the age of 18 years.

3. If a servant is employed by his master to sell goods in his shop, and the servant carries them away and converts them to his own use, trespass * vi & armis lies for the master against him; per Cur. for he has not any interest, possession or other thing in them, and therefore if he intermeddles with them in any other manner, than by uttering of them by sale, according to the authority to him committed, he is a trespassor; for he hath not any authority to carry the wares out of the shop unfold; but all his authority is within the shop. 1 Le. 87, 88. Mich. 29 & 30 Eliz. C. B. Gloffe v. Hayman.

S. P. For he had the possession of them as servant, and that was the possession of the master. And Anderson said, that in all cases where the servant has neither a ge-

neral or special property, trespass lies; but that it is otherwise of a bailee. Mo. 248. pl. 392. Mich. 29 Eliz. Anon. but seems to be S. C. — * Where a servant runs away with goods committed to his trust above 40 s. the indictment is vi & armis, tho' properly it cannot be said so because they were in his custody. Cro. Car. 378. per Cro. J. Arg. Mich. 19 Car. B. R.

4. Trover and conversion by the master against the servant for 40 l. received for goods of the master's by the servant; it was objected that trover will not lie for money; but judgment for the plaintiff; because the possession of the servant was the possession of the master, and when the servant converts this to his own use, by this the master loses the property, and is also a conversion in the servant. Ow. 131. 43 Eliz. Hall v. Wood. — S. P. Cro. E. 638. * Holiday v. Hicks. — Ibid. 661. Judgment reversed, because trover lies not for money, unless it be in a bagg.

[322]

* Ow. 131. S. C. cited as adjudged.

5. Tho' an action does not lie for a breach of his master's command, yet if the servant does an act false & fraudulenter to draw his master into danger, an action well lies, viz. for the doing of any thing which either the law prohibits, or which is a breach of trust; and were the law otherwise, every one that

As where case was brought by a master against his servant, in which he

makes

*declared, that by a charter party, be so-
renanted to* makes a charter party must necessary be liable, and at the mercy of all the seamen and passengers. Per Cur. Sid. 299. Mich. 18 Car. 2. B. R. in Case of *Husley v. Pufy*.

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England to India, and that he nor any of his servants should bring from thence any callico &c. that he retained the defendant in his service for this voyage, and acquainted him with his said covenants and bonds for performance, and that he intending to make the plaintiff forfeit &c. did falso & fraudulenter bring from India to England in the said ship certain callicoes; after verdict for the plaintiff it was mov'd in arrest of judgment, but the Court gave judgment for the plaintiff, for the reasons aforesaid. Sid. 293. Mich. 18 Car. 2. B. R. Husley v. Pufy.

6. A servant or journeyman imployed to sell goods and receive money for his master's use sells a considerable quantity, and receives 160 guineas for his master, and goes away with 150 at the time of his discharge, and lays the 10 in a private place in the chamber where he lay, and after being discharged his master's house and service, he in the night time breaks open the house and takes the 10 guineas so hid; upon a special verdict this was held no burglary; for that the taking the money was not felony; for tho' in right it was his master's money, yet it was in his possession; and the first original act is no felony; and if he had laid it under ground in the garden, and afterwards come and took it away, this would have been no felony; per Wright, Herbert, Atkins, Powell and Holt, &c. Show. 53. Arg. cited as so held at Easter Sessions 1687.

(N) *Statutes.* Of the Old Statutes, and 5 El. 4. And *Actions What and How*; At Common Law and by Statute.

* Debt was brought against a bailiff upon this statute; the plaintiff counted that he required A. and J. who were within 40 years, and able, and they refused to serve him, by which they were arrested by the constable of the vill and delivered to the defendant, bailiff of the vill, who suffered them to go,

1. 34 E. 3. *cap. 9.* *It is accorded in this present parliament, that the statute of labourers of old times made shall stand in all points except the pecuniar peine, which from henceforth is accorded, that the labourers shall not be punished by fine and ransome. And it is assented, that the said statute shall be enforced in punishment of labourers in the form following, that is to say, That the Lords of towns may take and imprison them by 15 days if they will not justify themselves; and then to send them to the next gaol, there to abide till they will justify them by the form of the statute, and that the sberiff, jaylor, or other * minister shall not let them to mainprize nor bail, and if he do, he shall pay to the King 10l. and to the party 100s. nor that the sberiff, jaylor or other minister, shall take any fee nor portorage of prison, nor at his entring, nor at his going out upon the same pain. And that as well carpenters and masons be comprised of this ordinance as all other labourers, servants and artificers. And that the carpenters and masons take from henceforth wages by the day, and not by the week, nor in other manner. And that the chief masters of carpenters and masons take 4d. by the day, and the others 3d. or 2d. according as they be worth. And that all alliances and covins of masons and carpenters, and congregations, chapters, ordinances, and others betwixt them made, or to be made, shall be from henceforth void and wholly*

wholly annulled, so that every mason and carpenter, of what condition he be, shall be compelled by his master to whom he serveth, to do every work that to him pertaineth to do, or of free stone or of rough stone. And also every carpenter in his degree. But it shall be lawful to every lord or other, to make bargain, and covenant of their work in gross with such labourers and artificers, when please them, so that they perform such works well and lawfully according to the bargain or covenant with them thereof made.

by which action accrued; and per Knivet Ch. J. the statute is intended of minister of the King; and because the plaintiff has not

counted that the defendant is bailiff of the King, therefore ill; for a bailiff of a Lord of a manor, and who to him shall render account, cannot serve process &c. and yet the defendant passed over, and said that the constable did not deliver them; Prist, and the other e contra. Br. Labourers, pl. 34. cites 39 E. 3. 15.

2. 34 E. 3. cap. 10. Item, of labourers and artificers, that absent them out of their services in another town or another county, the party shall have the suit before the justices, and that the sheriff take him at the first day, as is contained in the statute, if he be found, and do of him execution as afore is said, and if he return, that he is not found, he shall have an exigend at the first day, and the same pursue till he be outlawed, and after the outlawry a writ of the same justices shall be sent to every sheriff of England, that the party will sue to take him, and to send him to the sheriff of the county where he is outlawed, and when he shall be there brought, he shall have there imprisonment till he will justify himself, and have made gree to the party, and nevertheless for the falsity he shall be burnt in the forehead with an iron made and formed to this letter F. in token of falsity, if the party grieved the same will sue. But this pain of burning shall be put in respite till Saint Michael next ensuing, and then not executed, unless it be by the advice of the justices. And the iron shall abide in the custody of the sheriff. And that the sheriff and some bailiff of the franchise be attending to the plaintiff to put this ordinance in execution upon the pain aforesaid. And that no labourer, servant, nor artificer shall take no manner of wages the festival days.

3. 34 E. 3. cap. 11. Item, if any labourer, servant or artificer, absent himself in any city or borough, and the party plaintiff come to the mayor and bailiffs, and require delivery of his servant, they shall make him delivery without delay. And if they refuse to do the same, the party shall have his suit against the mayor and bailiffs before the justices of labourers. And if they be thereof attainted, they shall pay to the King 10l. and to the party 100s.

4. Action upon the statute of labourers does not lie against two for departure &c. for he shall have several actions. Br. Labourers, pl. 12. cites 47 E. 3. 16.

S. P. For the retainer of one is not the retainer of

the other; nor is the departure of the one the departure of the other. Br. Joinder in Action, pl. 15. cites S. C.

5. If a labourer be retained to serve for term of life, he shall not have action of debt against the executors of his master without deed; for the statute does not compel him to serve in such form; contra if he had been retained for one year. Br. Labourers, pl. 44. cites 2 H. 4. 15.

D d 4

8. In

Br. Action
sur le Case,
pl. 38. cites
11 H. 4. 23.

[324]

* It should
be 33. pl.
60.

Br. Action
sur le Case,
pl. 55. cites
S. C.

8. In trespass it was agreed, that *at common law*, if a man had *taken my servant from me, trespass lay vi & armis*; but if he had *procured the servant to depart*, which he did accordingly, and he retained him, or if he had departed of his own head, and another had retained him knowing of the first retainer, action lay not at the common law vi & armis, but it lay upon the *case*, upon the departure by procurement; and in the 3d case where he departs without procurement, and was retain'd, case did not lie at the common law, and therefore was the statute of labourers made, which gave action in those cases; quod nota bene inde. Br. Laborers, pl. 21. cites 11 H. 4. 21, 22.

7. General writ upon the statute of labourers, and special count against a carpenter for [undertaking the] making of a house, which he did not make; and awarded good by the special count. Br. General Brief, pl. 5. cites 11 H. 4. * 32.

8. In debt the plaintiff counted, that he was retained to be receiver to the plaintiff for 7 years for 40s. a year &c. and the defendant demanded judgment, because the wages are more than is comprised in the statute of labourers, et non allocatur; by which he pleaded departure before any wages due, et non allocatur; for tho' he departs yet he may receive and pay; for he is not like to another servant; by which he said, that before any wages due, he agreed with the plaintiff for 10s. and discharged him, to which discharge the plaintiff agreed; which was admitted for a good plea. Br. Dette, pl. 186. cites 11 H. 6. 10.

9. If a man serves me at his will, and another beats him, by which I lose his service, I shall have action upon the case; per Newton Ch. J. and others. Br. Laborers, pl. 29. cites 21 H. 6. 9.

10. If a man be retained with me for a year to serve me at any time as I shall require him, this is a covenant, and of this I shall not have action upon the statute of labourers; per Newton, to which Fulthorp, Asque and Portington agreed. Br. Laborers, pl. 31. cites 22 H. 6. 30.

11. 5 El. 4. s. 3. So much of all statutes made, and every branch thereof as touch or concern the hiring, keeping, departing, working, wages, or order of servants, workmen, artificers, apprentices and labourers, or any of them, and the penalties and forfeitures concerning the same, are repealed; howbeit the said statutes, and every branch and matter therein contained, not repealed by this act, shall remain in force.

S. 8. None shall put away his servant before the end of his term without a quarters warning or some lawful cause to be proved by two sufficient witnesses before the justices of oyer and terminer, justices of assise, justices of peace in sessions, a head officer, or two discreet aldermen or burgeses, in pain of 40 s.

S. 10. No servant, having served in one city or town, shall get to serve in another without a testimonial, viz. in a town corporate under the seals of the town, and two householders there; and in the country under the seals of the constable or constables and two householders there; which testimonial shall be made and delivered to the party, and also registered

gifted by the minister of the place where the servant dwelt, for which the minister is to have 2d.

The form of the testimonial is this: Memorandum, that A. B. servant to C. D. of J. in the county of E. husbandman or taylor &c. in the said county, is licensed to depart from his said master, and is at his liberty to serve elsewhere according to the statute in that case made and provided, in witness &c.

S. 11. The servant which sheweth not such a testimonial to the chief officer in a corporation, or to the minister, or some officer in any other place where he is to dwell, shall suffer imprisonment till he procure one, and if he procure not one within 21 days after his imprisonment, or shew a false one, he shall be punished by whipping, as a vagabond: and the master that retains a servant without such a testimonial shall forfeit 5l.

S. 12. Those that work by the day or week, shall continue at work, betwixt the middle of March and the middle of September, from 5 in the morning till betwixt 7 and 8 at night, except 2 hours allowed for breakfast, dinner, and drinking, and half an hour from the midst of May to the middle of August for sleeping; and all the rest of the year from twilight to twilight, except an hour and a half allowed for breakfast and dinner; in pain to have one penny defalked out of their wages for every hours absence.

S. 14. None that takes work by the great shall leave the same before [325] it be quite finished, except for not payment of his wages, the Queen's service, licence of the work-master, or other lawful cause, in pain to suffer one month's imprisonment without bail, and to forfeit 5l. to the party grieved, besides his costs and damages to be recovered at the common law for the loss sustained.

S. 20. Every retainer, promise, gift or payment of wages, or other thing contrary to the true meaning of this act, and every writing and bond to be made for that purpose, shall be void.

S. 21. If any servant or other shall be convicted before 2 justices of peace, or a chief officer as aforesaid, by his own confession, or the testimony of two honest men, to have assaulted his master, mistress, dame or overseer, he shall suffer one years imprisonment, or less if the justice or chief officer shall think fit, and if the party shall be thought to deserve a more severe punishment, then to receive such open punishment (life and member excepted) as the justices in sessions, or the chief officer and four of the discreetest men in the corporation shall think convenient.

S. 22. Artificers shall work in hay-time and harvest in pain of imprisonment in the stocks two days and one night, which the constable shall inflict upon them in pain of 40s.

S. 23. It shall be lawful for labourers (other than such as are retained in service according to this statute) to go to other shires to work in hay-time and harvest, so that they bring with them a testimonial under the hand of one justice of peace, or chief officer, testifying that they have not sufficient work in the place where they lived the winter before; for which testimonial they shall only pay a penny.

See (S) pl. 1.
—Actions
(B. c) —
Trespafs.

(O) Actions by the Master on Account of the Servant.

Note, If it
be in the *
same county,
he must take
notice of the

1. **I** F a man retains another's servant not knowing that he was in the other's service, he shall not be punished for so doing, if he do not retain after notice of his first service: F. N. B. [168] (C).

at his peril; but he is not punishable if he be found vagrant in another county. 17 E. 4. 7. 18 E. 4. 5. except he procure his departure; and if so, he is punishable by the statute; but if one retains a servant, who has left his master within the term, or if one procures a servant to depart within his term, and after retains him, so that he has notice, yet he is not punishable at common law, de serviente abducto. 11 H. 4. 24. adjudged; sed quære, and 9 E. 4. 32. seems contra. And if one takes my servant out of my service, against my will, tho' it be with the servants good will, yet a general writ of trespafs lies. F. N. B. 397. (C) in the notes there (2) cites the above Cases.

* It was moved by Finch, If I retain the servant of another man in the same county where I and his master inhabit, this is not justifiable, tho' in verity I had not notice of that, and this according to the express book of the 19 Ed. 3. 47. Hobert said the book may not be law, for it is a hard matter to make me take notice of every servant which is retained in the same county, and yet perchance if this retainer be upon the statute of labourers at the sessions this is notorious, and I ought to take notice of that at my peril, but it is otherwise of a private retainer; for tho' it is within the same county, yet being a private matter of fact, the law will not compel me to take notice of that at my peril, otherwise if this be matter of record, 2 H. 4. 64. and Hobert and Winch seemed to agree. Winch 51. Mich. 20 Jac. C. B. Anon. cites the above Cases.

2. If a man takes an infant or other out of another's service, he shall be punish'd, altho' the infant or other was not retained. F. N. B. [168]. (D.)—And altho' the infant was but 10 years old, at which age an action lies not against the infant upon the statute. Ibid. in the notes there (b).

3. If a servant who was never lawfully retained (as where he was an infant under 10 years old) departs, there an action does not lie against him who shall afterwards retain him. Contra, if he be taken with force &c. tho' he found the infant vagrant and retained him. F. N. B. [168] in the notes there (c) cites it as a good diversity taken by Finchden. 38 E. 3. 5. and says, see 12 H. 8. 10. &c.

[326]
Cro. J. 223.
Trin. 7 Jac.
S. C. by
name of
TRACY v.
WEAL; but
that the ac-
tion was
brought by
the master,
and held
well enough,

4. A. forged a letter in the name of B. the master of C. falsely for 100l. to be delivered to A. which sum of his master's C. had in his custody, and A. seals this letter as with the seal of the said master; C. having received the said letter by A. caused it to be read; upon which C. delivered the said 100l. to A. (whereas in truth B. never wrote such a letter, but A. forged it). C. the servant brought an action upon this matter. It was adjudged for him, and affirmed in error, altho' in the name of the servant. Jenk. 315. pl. 1. cites 7 Jac. Tracy's Case.

per Cur. for the deceit and abuse is to the master, and the loss only to him.

Either the
master or the
servant may
have action;
per Jones
and Dode-
ridge J. Lat.

5. In action brought by the master upon his servant's being robbed of his money in an inn it was adjudg'd well brought by the master, and affirm'd in the Exchequer-chamber. Cro. J. 224. Trin. 7 Jac. B. R. Bedle v. Morris.

127. Trin. 1 Car. 1. in Case of Drope v. Thain.

6. If a man's *servants are so threatened* as to their lives and limbs, and with loss of their goods by law-suits by another person that they *leave his service*, and he can get no other to live with him, because of such menaces, so that his business cannot be carried on, an action lies. 2 Roll. R. 162. Pasch. 13 Jac. B. R. Garrot v. Taylor.

7. Case lies for the master against one that *retains* his servant *departed without licence* within the time agreed for, and this without inticement, he having notice that he was the hired servant of another. 2 Lev. 63. Trin. 24 Car. 2. B. R. Fawcett v. Beares and Ux.

Le. 240: S. P. But no judgment. Adams v. Bafield.— Tho' he was not hired

according to the stat. 5 Eliz. Clayt. 116. Eastburn's Case.—But the master must *set forth his contract* with the servant. Arg. 8 Mod. 116. Hill. 9 Geo.

8. Action lies not for the master, unless he has *lost the service* of his servant. 2 Lutw. 1497. Hill. 12 W. 3. C. B. Randle v. Dean.

Bridg. 48. S. P. Arg.

(Q. 2) Actions by Master for Work done, and Things acquired by Servant.

1. **I**N debt the plaintiff counted, that *B. retained his servant to make cases and chairs paying 2s. a day, and that his servant had made cases &c. for five days, and so action accrued for 10s.* Defendant pleaded non debet; and judgment was given for the plaintiff. It was assigned for error, that, as this case is, debt lay not for the master, because it may be, that he *never consented to this retainer, and the servant never intended to contract for his master*, and cited F. N. B. 513. And for this and another exception, judgment was reversed. 2 Roll. R. 269. Hill. 20 Jac. B. R. Trufwell v. Middleton.

The count was *capiendo pro salario suo pro quolibet die 2s. &c.* It was objected, that if it were the retainer of the servant by the command and appointment

of the master, he ought to have shewn that he retain'd the master, and not the servant; for then he ought to have counted accordingly, that he retained the master, who by himself or servant should work &c. And of that opinion was all the Court, and (absente Lea) judgment was reversed. Cro. J. 653. S. C. by the name of Trufwell v. Middleton.

2. The contract of the servant may enure to the advantage or disadvantage of the master; but in both cases, the *master ought to agree, and this ought to be pleaded specially*; per Doderidge and Haughton J. 2 Roll. R. 270. Hill. 20 Jac. B. R. in Case of Trufwell v. Middleton.

As if a bailiff contracts for goods to stock his master's land, the count should

be upon the special matter with an *averment, that the master agreed to it, and that they came to the use of the master*; so where it is to the master's advantage, as where another charges himself to the servant for the use of the master, the count ought to be special; per Doderidge and Haughton J. 2 Roll. R. 270. in Case of Trufwell v. Middleton. [327]

3. If the master of one ship *takes a servant that belongs to the master of another ship*; whatever wages he receives from the King upon his account shall be to the use of his first master, being acquired by the labour and industry of the servant. Cumb. 450. Trin. 9 W. 3. B. R. Curtis v. Bridges.

4. Trover

4. *Trover* lies for the master for a *ticket* or other writing *intitling* his apprentice to money earned by him during the apprenticeship; but where the *trover* was against the *executor* of the apprentice for a *ticket* given out after death of apprentice for money earned by him during the apprenticeship, the action is not maintainable, because it never was in the apprentice's possession; but if executor after receives the money, master may have *assumpsit* for so much money received to his use; per Holt Ch. J. 12 Mod. 415. Trin. 12 W. 3. Anon.

5. *Quicquid acquiritur servo acquiritur domino*. Co. Litt. 117.2.

(O. 3) Action by the Master for Goods sold by, or Promises made to the Servant.

1. **A**N *assumpsit* to the servant for the master is good to the master. And an *assumpsit* by appointment of the master of the servant shall bind the master, and is his *assumpsit*; per Doderidge J. Godb. 360. *Seignior v. Wolmer*.

2. If my *bailly* sells corn or cattle, I shall have an action of debt for the money; per Doderidge J. Godb. 361. Trin. 21 Jac. B. R. in Case of *Seignior v. Wolmer*.

(P) Actions. By Servant against others on account of the Master's Goods.

1. **I**F a servant lodges in an inn having goods of his master with him, which are there *stolen* from him; either the master or the servant may have an action; per Jones and Doderidge J. Lat. 127. Trin. 1 Car. in Case of *Drope v. Thaire*.

2. Servant may have action for goods taken from his possession, and declare as for *bona sua*, because of the possession; per Holt Ch. J. Show. 154, 155. Pasch. 2 W. & M. in Case of *Knight v. Cole*.
As where the servant is robbed of goods part his master's and part his own. Brownl. 155. Trin. 8 Jac. *Needham v. Stoke inhabitants*.

See (E). (Q) Actions, by others against the Master or Servant.

ONE sent his servant to sell a counterfeit *bezoar's stone* for a *bezoar's stone*, and the servant knew the deceit; action on the case lies against the servant. Arg. 2 Roll. R. 28. cites 3 Jac. B. R. *Lopez's Case*.

[328] 2. No action will lie against a servant for doing a thing in obedience to his master's command, where it is not an apparent wrong; for if the master's command depends upon a title, be it true or not, it is enough to excuse the servant; and otherwise it

it would be a mischievous thing, if the servant upon all occasions must be satisfied with his master's title and right before he obey his command, and it is very requisite that he should be satisfied if an action should lie against him for what he doth in obedience to his master; per Scroggs J. 2 Mod. 244. Trin. 29 Car. 2. C. B. in Case of Mires v. Solebay.

3. A servant was sued solely for a tortious act done by the command of his master. 3 Lev. 352. Pasch. 5 W. & M. C. B. Sands v. Child.

4. If a carriers servant loses goods, the owner has an action against the servant only in case of conversion. 11 Mod. 135. Trin. 6 Annæ B. R. Savage v. Walthew.

But if a conversion be to the use of the master, the action

ought not to be brought against the servant, but it ought to be brought against the master; per Cur. 2 Mod. 245. Trin. 29 Car. 2. C. B. Anon.

(R) Pleadings in Actions on the Statute.

1. ACTION upon the statute against A. of B. because he had esloign'd T. N. his servant and apprentice out of his service at L. and the defendant said that the plaintiff pending this writ had brought writ of ravishment of ward directed to the sheriff of L. supposing that he had ravished this same servant out of his ward, returnable crastino animarum last past, to which writ he has appeared, judgment if to this writ he shall be received; and Sharde awarded this a good plea, and gave him a day to bring in the record; quod nota bene; therefore it seems that this is the more high writ; for in ravishment of ward he may recover the body of the infant, but in this action only damages. Br. Action sur le Statute, pl. 19. cites 27 Aff. 21.

2. Action upon the statute of labourers; Paston counted and would have rehearsed the statute; but per Preston he need not; by which he counted that he was his servant retained, and departed &c. quod nota. Br. Action sur le Statute, pl. 12. cites 5 H. 5. 11.

S. C. per Cur. and the reason seems to be because the statute is general. Br. Count,

pl. 84. cites S. C.—Br. Labourers, pl. 45. cites S. C. and 1 H. 6. 1.

3. Trespass upon the statute of labourers, against the servant who departed &c. he said that he was his apprentice, judgment of the writ &c. and per Cur. it is no plea if he does not traverse that he was not his servant. Br. Traverse, per &c. pl. 10. cites 9 H. 6. 7. 8.

4. Where a man counts in debt upon a retainer in service for 8 years to serve in all occupations taking 20s. per ann. and that he served for 8 years and for 8l. arrear action accrued; this is a good count by the statute, per Cur. and yet retainer for 8 years is not good by the statute, but ought to be retained for one year, or for a year and so from year to year, but because he said that he retained him for 8 years, taking 20s. per ann. it is intended that he was retained for one year for 20s. and continued in

in service for 8 years, and therefore the count is good; per Cur. quod nota. Br. Count, pl. 56. cites 38 H. 6. 13.

S. P. and it is a good plea in bar that the defendant found the servant vagrant in another county

5. In an action upon the statute of labourers, if the plaintiff does not count in what place he took his servant the writ shall abate; and it appears often that there is no other judgment for default in the count, but that the plaintiff nihil capiat per breve; for default in the count the writ shall abate, and he shall not make a new count. Br. Brief, pl. 488. cites 17 E. 4. 7.

[329] out of all service, and not any merchant nor having land, by which he retained him to serve him for a year, absque hoc that he retained him in London, prout &c. and a good plea, per Cur. for he is not bound to take notice of a thing in a foreign county. Contra, if both the retainers are in one and the same county. Br. Action sur le Statute, pl. 33. cites 17 E. 4. 7.— S. P. Br. Traverse per &c. pl. 250. cites S. C.

See Trespass.

(S) Pleadings in Actions by the Master against others in respect of the Servant.

1. **T**Respass upon the statute of labourers of taking of his servant out of his possession, the defendant said that the servant is an infant under 10 years of age, and because the plaintiff could not deny it, he took nothing by his writ. Br. Laborers, pl. 24. cites 38 E. 3. 5.

2. Trespass upon the statute of labourers, for that the plaintiff offered the defendant who was a vagrant to have him in his service, and he refused; the defendant said that at the time &c. he was retained with R. G. the plaintiff said that R. G. is a boy and has not land sufficient to have a servant; and the issue was taken upon the sufficiency generally, without mentioning more of the land, the reason seems to be inasmuch as several are sufficient to have servants who have not any land. Br. Laborers, pl. 25. cites 38 E. 3. 12.

3. Action upon the statute of labourers against A. the servant, and R. who detained him, and A. was of the age of 5 years, and therefore per Finch. the action does not lie against him; for his covenant is void, by reason of his tender age, and therefore it does not lie against R. who accepted him; for he is accessory; quære inde. Br. Laborers, pl. 6. cites 41 E. 3. 17.

4. If the master avows one way and the servant another, the avowry of the master shall be taken; per Coke Ch. J. 3 Buls. 111. cites 49 E. 3. 25.

5. If I have a feme sole in service, and a man takes her to wife, he may well do it, but it is not lawful for him to take her out of my service. Br. Laborers, pl. 18. cites 2 H. 4. 13. per tot. Cur.

And per Moyle if your servant comes to labour with me you shall not have action, contra

6. Trespass of taking R. his servant, and carrying him to L. the defendant said that he had espoused the mother of the servant, and he found him vagrant at Dale in the county of S. and the servant came with him to his house, and was there by one day &c. absque hoc that he is guilty of carrying him to L. and per Brian this is no plea, but not guilty; but Chock held the plea good, because affinity

was between the servant and the defendant, and otherwise not; and the best opinion of the Court was that it is a good plea. *Br. Laborers*, pl. 33. cites 6 H. 4. 32.

if I procure him to come, and so a difference where he

takes or procures the servant, and where he comes of his own head: quod nota. *Ibid.*

7. In trespass of taking his servant it is a good plea that the defendant is a schoolmaster, and the father of the servant brought him to the defendant to instruct him &c. and he is not bound to take notice that he was in service. *Br. Laborers*, pl. 33. cites 6 H. 4. 32. per Fairfax.

And per Litt. in trespass of a servant &c. it is a good plea that he is a common

surgeon, and the servant had broke his thigh, so that he could not go, and came to him to be cured. Ibid.—And per Moile if your servant comes to me, and prays me to take him into service, and I take him, I am not bound to take notice of the former retainer. Ibid.—And if a servant comes to me and prays me for the honour of God to harbour him, I may well do and justify it, for it is an act of charity. Ibid.

8. In trespass of taking his servant; if the defendant says that he was retained with him before that he was retained with the plaintiff, there the plaintiff ought to reply, that such a day he was retained with him, before which day he was not retained with the defendant, and otherwise the replication is not good without expressing the day. *Br. Replication*, pl. 49. cites 3 H. 6. 28. [330]

9. In action upon the statute of labourers of taking his apprentice, or in trespass of it, the defendant may plead that the covenant is void, in as much as he went to husbandry till 12 years, or that his father or mother cannot expend 20 s. land of franktenement, and this he shall conclude to the action, and not in bar. *Br. Laborers*, pl. 26. cites 8 H. 6. 23.

10. Trespass upon the statute of labourers of taking a servant retained; the defendant said that the servant made the covenant by duress, and was within age, and the defendant has 20 l. land, and the servant is his heir apparent; per Babb. if your son makes covenant to serve me, this is good tho' you have 100 l. land; and as to the age, if he be of the age of discretion, and makes covenant to serve in husbandry, this shall bind him, and so the duress is only material; quod fuit concessum. And per Martin, a man may be lawfully imprisoned if he will not serve his covenant. But per Babb. this shall be by the King's officers, and not by the party; and a man may retain the heir, who is in his ward, but not imprison him. *Quære. Br. Laborers*, pl. 43. cites 9 H. 6. 10.

11. Action upon the statute of labourers, because the defendant was a vagrant, and was required to serve and refused; there per Martin, if he be retained with one to serve by the day, and is required by another to serve by the year, there he shall serve the day, and after the day ended he shall serve the other by the year; but if he be retained for 20 or 40 days, and be required by another to serve by the year, he ought to obey it; for retainer by 20 or 40 days * is no usual time of hiring; but contra of retainer by the day. *Br. Laborers*, pl. 49. cites 11 H. 6. 1.

And if a man be retained by one year, and after is vagrant, and will not serve accordingly, there if another requires him to serve, he ought to obey it, and

yet shall be charged to the former master: per Martin; *quære. Ibid.—And in this action if he says that he is retained with J. N. by the year, absque hoc that he is out of any service, it is*

doubted

doubted if the plea be good; for he is not out of service if he works by the day. *Quære. ibid.*—
 * Orig. (next usual journey.)

12. If an *infant of 7 or 8 years old* makes a covenant to serve me, he may depart at his pleasure; but if he serves me, and J. S. beats him, I shall have action upon my case for loss of his service. Br. Laborers, pl. 29. cites 21 H. 6. 9.

13. Trespass by E. against W. for that he *vi & armis took from him N. his apprentice, and did not declare when the retainer was, nor how many years he should be apprentice*; and yet the count was awarded good; for he is not to recover the apprentice by this action, but *only damages*. Br. Trespas, pl. 144. cites 21 H. 6. 31.

14. In *trespas quare N. apprenticium suum cepit & abduxit*, it is no plea, that after the apprenticeship and before the taking the plaintiff *discharged* the apprentice at D. in the county of N. for an apprentice cannot be but by writing; and therefore a discharge by parol is not good; by judgment. Br. Barre, pl. 28. cites 21 H. 6. 31.

§. P. Br. Trespas, pl. 144. cites 21 H. 6. 31. But in trespass upon the Statute of Labourers mention shall be made of a retainer, and the retainer is traversable. Nota. Ibid.

15. In *trespas quare servientem suum cepit &c.* if he declares that he was his apprentice the writ shall abate; for it should be *quare apprenticium suum cepit &c.* Br. Laborers, pl. 30. cites 21 H. 6. 33.

16. In *trespas of taking his servant out of his possession*, the writ nor the count do not make mention of any retainer but *quod J. N. servientem suum in servicio suo existentem cepit & abduxit*; for he may be a servant at will. Br. Laborers, pl. 31. cites 22 H. 6. 30.

17. Action upon the statute of labourers, where the plaintiff retained J. in his service, and he departed and came to the defendant, who admitted him into service; and by the opinion of the Court the plaintiff ought to allege day and place where the admission was made. *Quod nota.* Br. Laborers, pl. 32. cites 22 H. 6. 58.

[331] * Orig. (scerie) and in the other book (scyerie.)

18. Trespass of taking and carrying away his apprentice, the defendant alleged certainly how the defendant *such a year, day, and place before, retained the servant to be his servant for 6 years in the art of a * sawyer*, taking victuals, drink, vesture, and education for his labour, and after he departed and became the apprentice of the plaintiff, and the defendant the day of the trespass &c. came to him, and required him to go with him to serve him, and tendered his hand to him, and he took him by the hand and went with him, which is the same taking, judgment &c. and the plaintiff demurred in law. *Quære causam*; it seems because the defendant did not give notice to the plaintiff before the taking. Br. Laborers, pl. 4. cites 28 H. 6. 11. and 49 E. 3.

19. In case for deceit the count was, that B. W. was the plaintiff's servant in comitat. Derby, and had 65l. of the plaintiff's in his custody; that the defendant intending to deceive the plaintiff of the said 65l. *quandam literam in the plaintiff's name procured to be written, and directed it to the plaintiff's said servant, and counterfeited the name of the plaintiff thereto, and sealed it quasi*
 with

with the said plaintiff's seal; and caused it to be delivered to the said B. W. affirming it to be the plaintiff's letter, and that he was sent therewith unto him by the plaintiff; whereupon he caused the same to be read, and upon reading thereof understanding quod in eadem litera continebatur, that the plaintiff had appointed the said B. W. to pay and deliver to the defendant the said 65 l. to the use of one T. B. to whom it was supposed by the said letter that he was indebted, and affirmed, that he was servant to the said T. B. and that he was to receive the said 65 l. for his master, by reason whereof the said B. W. giving credit unto him, payed and delivered unto him the money; ubi revera the letter was counterfeited, and he never sent the defendant, nor was indebted in any such sum &c. The defendant pleads not guilty, and found against him. It was moved in arrest of judgment; 1. That this supposition quendam literam scribi fecit, where it ought to be *litteras* (for it is not possible that one letter might comprehend it) was not good. 2dly, That this action lies for the servant and not for the master. 3dly, That it was *not shewn* what was contained in the letter; for it is *only*, that the said servant intelligebat what was therein written, and that might be his misconstruction. But all the Court after several motions held it to be well enough; for the deceit and abuse is to the master, and the loss only to him; wherefore the action well lies for him; also although it is not precisely set down what was in the letter, but that intelligebat such matter was contained therein, which is uncertain, yet because the deceit is alleged to be in the delivery of the counterfeit letter, and affirming that he was servant of T. B. and sent by the plaintiff to receive such a sum, as due by him to the said T. B. (all which was false, and all which being deceit) upon the whole matter the action well lies, and was adjudged for the plaintiff. And afterwards a writ of error being thereof brought, and all these matters assigned for error, the judgment notwithstanding was affirmed. Cro. J. 223. Trin. 7 Jac. B. R. Tracy v. Veal.

20. Trespass by the master for an assault on his servant by giving him a box on the ear; after a verdict for the plaintiff it was moved in arrest of judgment, that the declaration was ill; for the plaintiff had *not alleged per quod servitium amisit*, and for this cause the judgment was stayed. Nels. Abr. 1169. Master and Servant (C) pl. 6. cites 1 Bulst. 163. Trin. 9 Jac. [But it is not there.]

21. In trespass quare vi & armis one such being his servant cepit & abduxit at D. in Essex; the defendant pleaded that he was a vagrant in the same county, and he not having notice that he was servant to another retained him and then Finch moved that the plaintiff had charged the defendant with his servant by cepit & abduxit, and the defendant excused himself, and never traversed cepit & abduxit and cited 11 H. 4. per Hutton and Hobert, the receiving and the entertaining of a servant may not be said to be vi & armis. Winch. 51. Mich. 20 Jac. C. B. Anon.

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(T) Pleadings in Actions by others against Master and Servant, or one of them.

1. IF my bailiff buys sheep &c. to my use, I shall be charged, and shall not shew that the bailiff had warrant, or that they came to my use. Br. Contract &c. pl. 41. cites 2 R. 2.

Contra if they buy it to my use at the time of the bargain; per Newton.

2. But if my wife or servant buys stuff, which comes to my use I shall not be charged; per Newton. Br. Contract &c. pl. 41. cites 20 H. 6. 22.

Br. Contract &c. pl. 41. cites 20 H. 6. 22.

3. In action upon the statute of labourers against the master and servant the plaintiff may count one and the same count against both; per Cur. and shall not be drove to two counts. Br. Laborers, pl. 2. cites 9 H. 6. 7.

4. If the servant does not bind himself to payment by express promise, he is not any ways chargeable if it comes to the use of the master; and the servant ought to plead that it came to his master's use. D. 230. b. Marg. pl. 56. cites Mich. 6 Jac. B. R. Good-baylie's Case.

* The proper plea in such case is not guilty; per Powel J. quod non quit negatum. 2 Lutw. 1497. Hill. 12 W. 3. C. B. in Case of Randal v. Dean.

5. In trespass for battery of his servants * per quod servitium amisit; the defendant said, that he only thrust away the servants &c. Coke said if this plea be true, he might have pleaded not guilty well enough; for this cannot be loss of service. 1 Roll. R. 393, 394. Trin. 14 Jac. B. R. Norris v. Baker.

(U) Pleadings in Actions between the Master and Servant.

1. A Man declared of retainer in husbandry for 8 years, and no exception was taken to the retainer, tho' it was for 8 years; quod nota. Br. Laborers, pl. 36. cites 38 E. 3. 22.

* Orig. (poisoner) but in the year book it is (poison').

2. Trespass upon the statute of labourers, for that the defendant was in his service, and departed within the term; the defendant said, that he made covenant with him to be his apprentice in the art of a * fishmonger, and he would not teach him the mystery, but beat him, by which he could not stay with him; judgment &c. And it was agreed that this action does not lie of an apprentice; by which the plaintiff said, that [he was] his servant and not his apprentice, Prist; and it was held double, the apprentice and the battery, but he replied upon the apprentice; and so see that battery is cause of departure. Br. Laborers, pl. 35. cites 39 E. 3. 22.

Where the plaintiff supposed the defendant

3. Writ upon the statute of labourers, because the plaintiff had retained the defendant in office of salary for 6 years, and the other said that he was his apprentice and not his servant retained, Prist; and

and a good answer. Kirton said, he counted of a retainer *to be his* for 6 years where the *statute does not give action but upon retainer* *servant, and* for one year; and Fencot demanded judgment, because he *the defend-* counted that he departed the first year &c. Br. Laborers, pl. 8. *ant said that* *he was his* *apprentice,* *judgment of* cites 45 E. 3. 13.

the writ, because he might have writ of covenant; this is no plea per Cur. without *traverse* that he was his servant. Br. Laborers, pl. 2. cites 9 H. 6. 7.

4. In action upon the statute of labourers, the *defendant said* [333] *that he never was retained in his service, without answering to the* In trespass upon the statute of labourers of retainer in covenant to serve; quod nota; for it seems that all is one. Br. Laborers, pl. 9. cites 46 E. 3. 4.

his service and departing before the end of the term, it is no *plea that he was never in his service,* but shall answer to the retaining, by award; for *by the retainer he is in his service immediately* by the law, tho' he does not come into his service in fact. Br. Laborers, pl. 11. cites 47 E. 3. 14 & 41 E. 3. 20.

5. Writ upon the statute of labourers was against a servant for *departure*, who said that the plaintiff *retained him to serve for 6 weeks and after for a year if it pleased him, and if not then to depart, by which he departed as lawfully he might.* Hank. said, if make a covenant with one to serve me, he shall come into my service for one whole year; but per Hill, yet he has well pleaded; for condition is no plea upon a request to serve; but upon the retainer and departure, it is a good plea that the retainer was upon condition; quod nota; by which the plaintiff took averment that he covenanted to serve him for one whole year without condition, Prist &c. Br. Laborers, pl. 23. cites 11 H. 4. 42.

6. It was agreed arguendo in trespass upon the case of the not making of a mill, that if a man *retains a labourer to serve him according to the form of the statute,* the labourer shall have action for his salary, tho' *no salary be mentioned upon the retainer.* Br. Laborers, pl. 1. cites 3 H. 6. 23.

But contra in retainer to make a mill &c. For the one is certain by the statute,

and the other not; note a difference. Ibid.

7. Action upon the statute of labourers, that he retained the defendant in the office of labourer. The defendant said that he *retained him to collect his rent, absque hoc, that he retained him in office of labourer,* and a good issue per Cur. For the statute is only of those who may be required to serve as labourers, and this a collector of rent is not; for it seems that it is not reasonable that the man shall be compelled to be accountable. Br. Laborers, pl. 28. cites 19 H. 6. 53.

8. Where a man counts that he retained his servant to serve him in his house, this is sufficient tho' he does not say in what office, as servant of husbandry, cook, butler, groom &c. per Cur. Br. Laborers, pl. 29. cites 21 H. 6. 9.

9. If an infant be retained to serve, and action upon the statute of labourers is brought against him, it is a good plea *that he is an infant;* per Paston; but per Markham, this is where he is under 14 years; but per Paston all is one; Brooke says, it

seems that the law is with Markham; for the statute is, potius in corpore. Br. Laborers, pl. 30. cites 21 H. 6. 33.

10. Note that *he who is not able in body, nor 5 years old, and he who has lands and tenements, and gentleman, cook, butler, chaplain, yeoman &c.* who shall not be compelled by the statute to be retained in husbandry, yet if they are retained in husbandry the master in debt for his salary shall not wage his law; because they are retained in husbandry; contra if they are retained in their degrees; and in debt for such salary it is a good plea for the defendant that he did not retain the plaintiff in husbandry, and it is not negativa pregnant; for he shall not be compelled to say quod non retinuit generally; for it may be that he retained him in other service, and not in husbandry; but *non retinuit modo & forma*, is a good plea; for this shall be referred to the declaration by these words, modo & forma. Br. Laborers, pl. 46. cites 38 H. 6. 22.

11. If a servant departs the master may retake him and retain him in spite of his teeth, but cannot imprison him. Br. Laborers, pl. 51. cites F. N. B. 168.

12. In account by the master against the servant for money received, the servant charges, that part of the money was stole by persons unknown out of the master's warehouse; per Cur. shewing he was robbed is giving an account. Vent. 121. Pasch. 23 Car. 2. B. R. Vere v. Smith.—Cumb. 311. S. P. obiter.

[334] (U. 2) Pleadings. Between Master and Artificers &c.

1. **A**ction upon the statute of labourers; the defendant said, that he has 15 acres of land, for which he ought to do 20 days work by the year, to the bishop of D. at his manor of W. and had the day that the plaintiff required him to serve, judgment &c. And the plaintiff said, that he had only six acres, for which he shall do only six days work, which may be done in one week, judgment &c. Upon which the defendant demurr'd; and it was awarded that the plaintiff take nothing by his writ; the reason seems to be inasmuch as if he shall be retained with another, it is not lawful for him to depart from him to do the six days work, nor any other work, and so [has] sufficient cause to be occupied, and therefore not liable by the statute; quod nota. Br. Laborers, pl. 5. cites 40 E. 3. 39.

* Orig. (broderer).
—By which he said, that he was retained with him † by the day at a certain rate,

2. Action upon the statute of labourers against one who was retain'd in the office of an * embroiderer for half a year, and departed within the term. Hamm. demanded judgment of the writ, for the statute regards only servants and labourers, and not artificers; et non allocatur. Br. Laborers, pl. 15. cites 47 E. 3. 22.

absque hoc, that he was retained a year, Prift; and the others e contra. Br. Laborers, pl. 15. cites 47 E. 3. 22.—† Orig. (per journeys, per taxe) but the year book is (per journees a la foith & a la foith per tax a lour agreement.)

3. Action upon the statute of labourers, because he *departed* out of his service; the *defendant* said, he *was retained with him in the office of carpenter to make a house, and he came to him to do his service, and he discharged him*, judgment; and because he made special count, the *general writ* was good, notwithstanding that carpenter is an artificer, and not a labourer; quod nota; by which the plaintiff said, *that he did not discharge him*, Prist; and the others *e contra*. Br. Laborers, pl. 22. cites 11 H. 4. 32.

(W) Pleadings by the *Servant* against others.

1. *Servant* shall not be ousted of the advantage which the law gives him by pleading *his master's command*. Per Cur. 2 Mod. 68. Hill. 27 & 28 Car. 2. C. B. Wine v. Rider & al. But it was said, that the servant cannot plead the command of his master in bar of a trespass. 2 Mod. 244. Trin. 29 Car. 2. in Case of Mires v. Solebay.

(X) Trial, where.

1. *Action* was brought upon the statute of labourers in the county where the covenant was made, whereas the departure was in another county, and yet well; for the covenant is issuable as well as the departure, and the action lies of departure if he was retained to be servant, tho' he was never actually in the service of the plaintiff; quod nota. Br. Laborers, pl. 7. cites 41 E. 3. 20.

[For more of Master and Servant in general, see Apprentices, and other proper Titles.]

(A) * Master in Chancery.

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* Polidore Vilgil says, that William the Conqueror instituted a college or society of clerks in this Court (then the Officina

1. *Masters* of the Chancery are exempt from the procurator of the clergy in the time of parliament. Br. Privilege, pl. 56. cites F. N. B.

Justitiae of the realm) for the making all manner of writs which issued thence, among whom the Clerici de prima forma (the masters) were a principal part. P. R. C. 237.

In ancient days they were sometimes created by the King's letters patents; but by BACGOT's Case, 9 E. 4. 5. [b. pl. 20. per Pigot], it should seem this was at that time wore out of use, and they were made by the election of the Court, and swearing them. P. R. C. 236.

Besides the Master of the Rolls, the chief, there are eleven other Masters of Chancery: these eleven are from time to time, upon death or surrender, appointed by the respective *Ld Chancellors* for the time being. P. R. C. 236.

It is said, the Lord Keeper Egerton ordered that there should be a *memorandum of their assistance made on the close rolls of the petty bag.* P. R. C. 236.

Their office seems originally to have been partly to sit as *assistants* with the Chancellor; and still two or three of them by turns sit with him at Westminster in Term-time, and two at a time when he sits out of Term; and two of them sit with his Honour the Master, at the Rolls. P. R. C. 236.

The other part of their office was to *form writs as occasion required*; as, where in some case the writ was already given, which did not exactly suit another particular case falling under the same reason with the former, they were to frame a new writ according to the statute of Westminster, 2. ca. 24. which enacts, *Quotiescunq; eveniunt in cancellaria, quod in uno casu reperitur breve, & in consimili casu cadente sub eodem jure simili indigente remedio non reperitur, concordent clerici de cancellaria in brevi faciundo &c.* P. R. C. 236, 237.

2. A Judge, sitting in the absence of Ld North, being about to make a decree, the Masters present *stood up and oppos'd*, they being of opinion against the Judge; upon which the cause was continu'd in the paper. Vern. 265. Mich. 1684. Merret v. Eastwick.

But now by the 12 Geo. 2. cap. 22. s. 2. it is enacted, That there

3. Where money is to be put out on security to be allow'd by a Master, and the *security proves defective*, he is not chargeable unless there had been either bribery or corruption. 2 Vern. 90. Mich. 1688. Comer v. Hollinshed & al.

shall be one person appointed by the Court of Chancery to do all things relating to the delivery of the suitors money &c. into the Bank, and taking them out, and keeping accounts with the Bank, as by the orders in the said act mentioned are directed to be done by the Masters and Usher; which officer shall be called the Accountant General of the Court of Chancery, and an account shall be kept in a room with the Bank of England on the behalf of the suitors in such manner as is directed by the said orders with respect to the Masters &c. And by s. 3. the Accountant General shall stand in the place of the Masters and Usher; and by s. 4. all mortgages, tallies, orders, stocks, annuities, and other transferable securities, shall, if appointed to be taken in the name of any officer of the Court, be taken in the name of the Accountant General.

4. At this day a *recognizance acknowledged before a Master, and certified under his hand*, is of that authority, that it is a *matter of record*; and as effectual as if it had been acknowledged in open Court. Also all *deeds or indentures*, which are to be acknowledged in Chancery, *must be acknowledged before some one of them.* P. R. C. 238.

5. *Answers and affidavits are sworn before one of them*, and by him sign'd. P. R. C. 238.

6. By an *act of parliament 18 Car. 2. not printed*, there is *one public office to be kept by them*, and no more, as near to the Rolls as conveniently may be; in which the Masters, some or one of them, *shall constantly attend* for the administering oaths, caption of deeds and recognizances, and the dispatch of all matters incident to their office (references upon accounts and insufficient answers only excepted), from seven in the morning till 12 at noon, and from two in the afternoon till six at night. P. R. C. 239.

7. And they may demand and take the fees therein mentioned. P. R. C. 239.

8. And it is also thereby enacted, That if the said Masters, or any of them, shall directly or indirectly by any act, shift, colour, or device, have, take, or receive any money, fee, or reward, covenant, obligation, promise, or any other thing, for his report or certificate in writing or otherwise, or for any other matters in the act expressed, other than the said respective-fee or fees in the act mentioned; that then every such Master (being thereof

thereof legally convicted) *shall thenceforth be disabled from the execution of his office, and shall forfeit to the party grieved so much money as shall be taken contrary to the act, and shall also forfeit 100*l.* one moiety to the King, the other moiety to the party grieved, who shall sue for the same in any of the King's Courts by action of debt, bill, plaint, information, or otherwise &c.* P. R. C. 241.

9. The *business* in equity encreasing, and the Master's business in forming writs decreasing or disused, the Ld. Chancellors have of late time referred *matters of account*, and such like, to their examinations, which are ordinarily decreed according to their certificate or report. P. R. C. 238.

10. *Exceptions* likewise taken to *answers* and *irregularities in practice*, *contempts* and such like are referred to them. P. R. C. 239.

11. Masters in Chancery have the same *privilege* of laying their actions in Middlesex as Barristers have, Gibb. 40. Burroughs v.

12. A question being, *whether one book was an abridgment of another*, or only evasively done and colourably only, the Ld. Chancellor said, he did not see what other method he could take to determine it, than by directing an inquiry before the Master, and in order that he may better determine it, his Lordship thought he ought to direct, that the Master be *attended by two persons skilled in the profession of the law to assist him*; but his Lordship chose rather, that two persons should be agreed upon by consent of both parties, than to be appointed by the Court. Which being afterwards done, his Lordship said, that the best way was to leave all matters in difference to the arbitration of those two counsel, and if they should not be able to make an award, then they to have liberty to choose an umpire. And the same was agreed to. Barn. Chan. Rep. 368, 370. Hill 1740. Gyles v. Wilcox.

His Lordship said, that directions of this sort have been made in mathematical and algebraical inquiries. Ibid. 370.

13. A client gave a *bond* to his attorney, reciting, that *whereas B. (the attorney) had been serviceable to J. C. (the client) in several causes, and still continues to be so, and the said J. C. being thoroughly sensible of the same services and favours, if the said J. C. shall leave to the said B. a legacy of 1000*l.* then the obligation to be void, otherwise to stand in full force.* J. C. died, but left no legacy to B. whereupon B. brought an action of debt against the executor of J. C. and had judgment. The executor brought a bill for relief as unduly gain'd. Ld. C. Hardwick, who had before decreed for the bond, now upon a rehearing, directed that the *Master inquire, what those services were, which B. did for J. C. and what he ought to be allowed for them*; and that he likewise inquire, *whether B. ought to have any allowance made him for any extraordinary services done by him.* Barn. Chan. Rep. 475, 483. Pasch. 1741. Walmley v. Booth.

[For more of Master in Chancery, see Reports, Answers, and other proper Titles.]

Master of a Ship.

(A) His Power and Duty.

1. **MASTER** of a ship is the chief mariner. Sti. 152. Roll. Mich. 24 Car. in Case of Wood v. Clement.

§ S. P. And he may freight out the ship, take in goods and passengers, mend and furnish the ship. 2 Molloy, cap. 2. §. 14. —

† S. P. with advice of his mariners. Ibid. —

‡ S. P. Ibid.

— § S. P. Ibid.

2. The whole power and charge of the ship being committed to the Master requires a staid man and of experience, whereunto the owners are to take great heed; for his power is described, partly by the owner or setter forth of the ship, and partly by the common law of the sea; by means and virtue whereof, the Master * may, if need be, borrow money in a strange country with the advice of his company † upon some of the tackle or furniture of the ship, or else sell some of the merchants goods, provided that the merchant be repaid again at the ‡ highest price that the like goods are sold for at the market: which being done, the freight of these goods so sold and repaid shall also be repaid by the Master to the owner of the ship, as well as the freight of the rest of the merchants goods, except the ship ¶ perish in the voyage, and in this case, only the price that the goods were bought for shall be rendered, and for no other cause may the Master take up money, or sell any of the merchants goods, altho' it were in danger of ship-wreck. Mal. Lex Merc. 102. cap. 22.

3. He is, before his departure, to deliver the names of all the persons which he is to transport, and of his mariners, which with us is but lately established: and at his return he is to deliver a true inventory of the goods of any persons, which shall happen to depart this life in that voyage, not only because his kindred and friends may have intelligence of it, but also because their goods may be safe and forth coming for one whole year: of which goods in the mean time, the bedding and appurtenances may be taken by the Master and his mate to their uses, as also such clothing and other things then upon his body may be delivered to the boats-man and the company, who do for that dispose of the dead body, putting the same into the sea. Mal. Lex. Merc. 103. cap. 22.

As to casting goods over-board.

He may in case of danger and extremity, cast the goods into the sea.

4. When a ship laden to sail from Bourdeaux to Caen, or some other place, is overtaken at sea by a storm, so that she cannot escape without casting some of her lading and merchandize over-board for lightening the said ship, and preserving the rest of the lading, and the vessel itself; then the Master ought to say, Sirs, it is convenient to cast over-board some of the ships lading. And, if there be no merchant but what gives his consent, or approves thereof by his silence, then the Master shall use his own discretion, and cast over-board some part of the lading; and, if the merchants do not like of it, but

but that they gainsay or contradict it, the Master nevertheless ought not to forbear casting out so much goods as he shall see convenient, he and the third part of his mariners taking their oath upon the bible, that keeping their right course, they were fain to cast part of the lading over-board to save their lives, and the ship, and the rest of the lading. And the wines, or other goods that were cast over-board, ought to be prized and valued according to the just value of the goods saved. And when those shall be sold, the price thereof shall be divided, liver for liver among the merchants. And the Master ought to make the division, and to compute the damage of the vessel, or the freight at his own choice, and to repair the damage sustained; the mariners also ought to have a tun free, and another divided by lot, according as it shall happen, if it appear, that he to whose lot it fell, did the part of a good and able seaman. Otherwise he shall be barred of his privilege. And the merchants in this case may lawfully put the Master to his oath. Mieke's Laws of Oleron, 5. 6. f. 8.

Jenk. 165. pl. 16. — S. P. admitted by Holt Ch. J. 6 Mod. 12. * King Richard 1. eldest son of K. H. 2. instituted a body of naval laws, in his return from the Holy Land, in the island of Oleron, which are yet ex-

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tant with some additions; de

quibus, vide Mr. Selden's Mare Clausum, lib. 2. cap. 24. and I suppose they are the same, which are attributed to him by Mat. Paris, anno 1196. and he constituted Justices to put them in execution. Hale's Hist. Law, 145, 146.

5. He must not carry any counterfeit cocquets, or other fictitious and colourable ship papers, to involve the goods of the innocent with the nocent. 2 Molloy 233. cap. 2.

Cocquets.

6. He may not use any unlawful colours, ensigns, pendants, jacks, or flags, whereby his ship or lading may incur a seizure, or the cargo receive any detriment or damage. 2 Molloy 232. cap. 2.

Colours.

7. Nor must he refuse the payment of the just and ordinary duties, and port-charges, customs and imports to the hazard of any part of his lading; yet if he offers that which is just, and pertains to pay, then he is excused. 2 Molloy 233. cap. 2.

Customs.

8. If it happen that the Master by reason of foul weather thinks fit to cut down his mast, he ought first to call the merchants, if there be any aboard the ship, and to say unto them, Sirs, It is requisite to cut down the mast, to preserve the ship and lading, it being in this case, no more than becomes my duty. Nay, it oftentimes happens, that they cut cables and rigging, leaving both the cables and anchors behind them, to save the ship and her lading; all which things are reckoned liver by liver, as goods that were cast over-board. And, when it pleases God, that the vessel arrives safely at her port intended, the merchants shall pay to the Master without any delay their shares or proportions, or sell the goods, or pledge them, or procure money to satisfy the same, before the said goods be taken out of the ship. And if he has allowed of them, and there happen controversies and differences touching the premises, so that he observes a collusion therein, the Master must not come by the loss, but ought to have his freight. Mieke's Laws of Oleron 6. f. 9.

Cutting down masts and rigging.

9. When

Disposing of the ship or goods. 9. When a man is made Master of a ship, or other vessel, and the said ship or vessel, belonging to several part-owners, departs from her own port, and comes to Bourdeaux, Rouen, or any other place, and is there freighted for Scotland, or some other foreign country; the Master in such case may not sell the said vessel, unless he hath a procuration, or a special order for that purpose from the owners. But in case he want monies for the necessary provisions of the said vessel, he may for that end, with the advice of his mariners, pawn or pledge part of the tackling of the said ship or vessel. Meige's Laws of Oleron. 4. f. 1.

2 Molloy. cap. 2. f. 16.

And where the ship is well engaged, she is for ever obliged, and the owners are concluded thereby till redemption. But in regard Masters might not be tempted to engage the owners, or in fetter them with such sort of

obligations, but where there is very apparent cause and necessity, they seldom suffer any to go Skipper or Master, but be that hath a share or part in her; so that if monies or provisions be taken up, he must bear his equal share and proportion with the rest. Nor can the Master on any case of necessity impawn the vessel or furniture; for if she be freighted, and he and the owners are to join in the laying in of provisions for the voyage, and perhaps he wants more, (a great sign of necessity), yet can he not impawn the vessel or furniture any other or further, than for his own part or share in her, the which he may transfer or grant, as a man may do an fifth or sixth part in lands or houses: but such obligation of the vessel must be in foreign parts or places, where the calamity or necessity is universal on the vessel, that will oblige all the owners. 2 Molloy, cap. 2. f. 15.

11. However, orders and instructions are as carefully to be look'd upon as the magnet. 2 Molloy, cap. 2. f. 16.

Entries. 12. When the Master shall arrive at Gravesend, he shall not be above 3 days coming from thence to the place of discharge; nor is he to touch at any key or wharf till he comes to Chejler's Key, unless hindered by contrary winds, or draught of water, or other just impediment to be allowed by the officers; and likewise he or his purser are there to make oath of the burden, contents, and lading of his ship, and of the marks, number, contents, and qualities of every parcel of goods therein laden, to the best of his knowledge; also where, and in what port she took in her lading, and what country built, and how manned, who was Master during the voyage, and who the Owners; and in out-ports must come up to the place of unlading, as the condition of the port requires, and make entries, on pain of 100l. 2 Molloy 238. cap. 2. f. 29.

13. Not

13. Nor is such a Master to *lade aboard* any goods *outwards* to any place whatsoever *without entering at the custom-house* her Captain's name master, burthen, guns, ammunition, and to what place she intends, and before departure to bring in a note under his hand of every merchant that shall have laid aboard any goods, together with the marks and numbers of such goods, and be sworn as to the same, on pain of 100l. 2 Molloy 238. cap. 2. f. 20. 14 Car. 2. cap. 11.—
12 Car. cap. 18.

14. No Captain, master, purser, of any of his Majesty's ships of war, shall *unlade* any goods before entry made, on pain of 100l. 2 Molloy 238, 239. cap. 2. f. 20.

15. He ought not to *ship* any merchandizes, but only at the publick ports and keys. 2 Molloy 232. cap. 2.

16. No ship to go from port to port in England, Ireland, Wales, Jersey or Guernsey, or Berwick, unless the owners are denizens or naturalized, and the Master and three fourths to be English. 2 Molloy 237. cap. 2. f. 18. Going from
port to port.

17. If the Master shall have *freight from port to port* within the realm, he ought to have *warrant for the same on pain of forfeiture* of the goods; and he is to take forth a cocquet, and become bound to go to such port designed for, and to return a certificate from the chief officers of that port where the same is designed for, and discharged within six months from the date of the cocquet. 2 Molloy 239. cap. 2. f. 21.

18. He may *sell bona peritura*. Vent. 238. per Hale Ch. J. in delivering the opinion of the Court. Hill. 24 & 25 Car. 2. in Case of Morfe v. Slue. Goods.

19. If the Master has any suspicion, he may *detain the goods for his freight*. Per Doctor Lane, Arg. 6 Mod. 13.—S. P. by Holt Ch. J. Ibid. 12.

20. He is not to bring any goods from any place, but what are of the growth of that very country, or those places which usually are for the first shipping, on pain of forfeiture of their vessel and furniture. 2 Molloy 237. cap. 2. Importing
goods from
what place.

21. This does not extend so far, but that Masters may take in goods in any part of the Levant or Streights, although they are not of the very growth of the place, so that they be imported in English ships, three fourths English mariners; so likewise those ships that are for India, in any of those seas to the southward and eastward of Capo Bona Speranza, although the ports are not the places of their very growth. 2 Molloy 237, 238. cap. 2. 12 Car. 2. cap. 18.

22. Any people of England may import (the Master and mariners being three fourths English) any goods or wares from Spain, Portugal, Azores, Madeira, or Canary Islands; nay in ships that are not English built, bullion may be imported; so likewise in those that are taken by way of prize bona fide. 2 Molloy 237, cap. 2. f. 19. [340]
But sugars,
tobacco, cot-
tons, ginger,
indicoes, fus-
tick, or any
other dying
wood of the

growth of his Majesty's plantations to be shipped, carried or conveyed from any of the English plantations, are to be carried to no place in the world, but are to come directly for England, Ireland, Wales, or Berwick, upon pain of forfeiture of ship and goods; and the Master is to give bond with one security in 1000l. if the ship be under the burden of 100 tons, and 2000l. if above, that upon lading he bring

brings his ship directly into England, Ireland, Wales, or Berwick, (the danger of the seas excepted); so likewise they are to do the same for the ships that shall go from the plantations to the plantations, to the Governor, upon forfeiture of the ship and goods. 2 Molloy 238. cap. 2. f. 19.

23. But from the Netherlands, or Germany, there may not be imported any sort of wines (other than *Rhenish*) *spicery*, *grocery*, *tobacco*, *pot-ashes*, *pitch*, *tar*, *salt*, *rosin*, *deal-boards*, *hard timber*, *oil*, or *olives* in any manner of ships whatsoever. 2 Molloy 232. cap. 2.

Mariners. 24. The Master is to keep his company in peace, and if any mariner shall be hurt in doing service, or by his companion, the Master shall cause him to be healed, as he who is only answerable for the fact within ship-board, and then by his authority recover from the other mariner the charges, and any thing that the hurt man has lost thereby, except that he who is hurt or lamed have provoked the other by evident assault or strokes. Mal. Lex Merc. 103. cap. 22.

And if a mariner fall sick, the Master shall cause him to be laid in a house, with all sustenta-

tion necessary and usual in the ship, but shall not stay in the ship until he be healed, and when he recovers health shall give him his hire, or if he die shall give it to the wife or nearest friends. But if a mariner be not hurt in the ship's service, the Master shall hire another in his place, and if he have a greater hire, that mariner then shall recover the surplus. Mal. Lex Merc. 103. cap. 22.—And always the Master ought to lend his mariners if they want. Ibid.—If through the Master's fault the ship boat perish with any mariners in it by spoiled ropes or otherwise, then shall the Master pay one whole year's hire to the heirs of the drowned. Ibid.

25. Also he ought to give his mariners flesh upon Sunday, Tuesday, and Thursday, and upon other days fish, or such like, with sufficient drink; but no meat to them that sleep not in the ship. Nevertheless, the quality and quantity of mariners food and hires goes diversly according to the divers customs of countries, and the conditions made with them at the entering of the voyage, whereof remembrance is kept to avoid discords, which are more dangerous on the seas than on land. Mal. Lex Merc. 103, 104. cap. 22.

26. 11 G. 12 W. 3. cap. 17. If the Master of any merchant ship shall, during his being abroad, force any man on shore, or wilfully leave him behind in the plantations or elsewhere, or refuse to bring home all such men as he carried out with him, who are in a condition to return when he is ready to proceed in his voyage homeward bound, such Master being convicted thereof, shall suffer three months imprisonment without bail.

Other ships and their anchors. 27. If a ship in her voyage, lying any where at anchor, be struck or grappled with another vessel under sail, for want of good steering, whereby the vessel at anchor is prejudiced, and the goods in her damaged; in such a case the whole damage is to be in common, and to be equally divided and appraised half by half. And the Master and mariners of the ship that struck, or grappled with the other, shall swear on the Holy Evangelists, that they did it not wittingly or wilfully; the reason of this judgment is, that an old vessel might not purposely come in the way of a better; which she will hardly do, as long as the damage must be equally shared. Mieve's Laws of Oleron 7. f. 14.

28. When two or more vessels lie in a harbour, where there is

is but little water, so that the *anchor of one of the vessels lies dry*, the *Master of the other vessel ought to speak to the Master of the other vessel to take up his anchor*, for it is too nigh and may do a prejudice. And, if the said Master, and his mariners *refuse to take up the said anchor*, then the *other Master and his mariners may* [341] *take up the said anchor, and remove it at a further distance; and, if the other oppose, and damage afterwards happen thereby, they are bound to give full satisfaction for the same; but if they had placed a buoy to the anchor, and then the anchor should cause any damage, in this case they shall not be bound to repair the damage; and therefore being in an harbour, they ought to fasten such buoys or anchor-marks, and such cables to their anchors, as may plainly appear and be seen at full sea. Mieke's Laws of Oleron 7. f. 15.*

29. If a pilot undertakes the conduct of a ship, to bring her to St. Malo, or any other port, and fails in his undertaking, so as the *ship miscarry through want of skill*; the said pilot shall make good all the damages that shall ensue thereby; but if he be not able to make satisfaction, *he ought to lose his head; and if the Master, or any of the mariners, or merchants, cut off his head*, they shall not be accountable for it; however, before they do it, they ought to know whether he has wherewith to make satisfaction. Mieke's Laws of Oleron 8, 9. f. 23.

Pilot.

30. When a ship or other vessel arriving at any place makes in towards a port or harbour, and puts out her flag, or gives some other sign to have a pilot come aboard, or a boat to tow her into the harbour the wind or tide being contrary, and a contract is made for piloting the said ship into the said harbour accordingly; and forasmuch as in some places it is a *custom*, and an unreasonable one, *that the third or fourth part of the ship lost shall accrue to the Lord of the place where that sad accident happened*, and like proportion to the salvors, and only the remainder to the Master, merchant, or mariners; therefore the persons contracting for the pilotage of the vessel, to ingratiate with their landlord, and to get to themselves part of the said ship and her lading, do like base and treacherous villains wittingly and *designedly misguide the ship that she may be lost*, and feigning to aid, help, and assist the distressed mariners, themselves are the first in pulling the ship to pieces, in purloining and carrying away the lading contrary to all reason and a good conscience; and, that they may be the more welcome to their landlord, run to his house to bring him the tidings of this unhappy disaster; whereupon the said landlord comes with his men, and takes his share and the salvors theirs, and the rest is left for the merchants and mariners; which being contrary to the laws of Almighty God, this law therefore shall be established, that (notwithstanding any law or custom to the contrary) *all landlords, salvors, and all others, that shall take, or purloin any of the said goods, shall be accursed, excommunicated, and punished as thieves and robbers; and as for such false and treacherous pilots, the judgment is, that they shall be put to a rigorous and unmerciful death, that very high gibbets shall be for that purpose*

purpose set up as near the place as conveniently may be, where they so guided and brought the said ship or vessel to ruin as aforesaid; and thereon shall these accursed pilots shamefully end their days; which gibbets shall be left standing, as a memorial of the fact, and as a caution to other ships that shall afterwards sail that way. Miegé's Laws of Oleron 9. f. 24.

Sailing.

* S. P. nor must he stay in port or harbour without just cause, when a fair wind invites his departure. 2 Molloy. 232. cap. 2.

31. If a ship being in an harbour waits for her freight to depart therewith, the Master ought, before he depart, first to * advise with his company, and say, Sirs, what think you of this weather? Whereupon perhaps some will tell him, it is not safe yet to sail the wind being but newly changed, and we had best first to see it settled; and others possibly will say, the weather is good and fair. In such case, the Master is to concur with the major part; upon failure of which, if the ship shall come to be lost, he shall make good the same (if he hath wherewithall) according to the full value upon a just appraisement. Miegé's Laws of Oleron 4. f. 2.

32. He may not set sail without able and sufficient mariners both for quality and number. 2 Molloy. 232. cap. 2.

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Ship.

See Hypothecation (A)

33. By the common law the Master of a ship could * not pawn the ship or goods; for no property either general or special was in him, nor is such power given unto him by the constituting of him a Master. 2 Molloy. 235. cap. 2.

pl. 1.—* He may pawn the ship if occasion be. Vent. 238. Morfe v. Slue.

33. 22 & 23 Car. 2. cap. 11. f. 2. Where any goods shall be laden on board any English ship of the burden of 200 tons or upwards, and mounted with 16 guns, or more if the Commander shall yield up the goods to any Turkish ships, or to any pirates, or sea rovers without fighting, he shall, upon proof thereof made in the Court of Admiralty, be incapable of taking charge of any English ship as Commander, and if he shall hereafter take upon him to command any English ship, he shall suffer imprisonment by warrant from the Court of Admiralty during 6 months for every offence; and in case the persons taking the said goods shall release the ship, or pay unto the Master any money or goods for freight, or other reward, the said goods, or money, or the value thereof, as also the Master's part of such ship so released, shall be liable to repair the persons, whose goods were taken, by action in the Court of Admiralty, and in case the Commander's part of the ship together with such money and goods shall not be sufficient to repair all the damages sustained, the reparations recovered on the Master's part of the ship shall be divided pro rata amongst the persons prosecuting and proving their damages, and the persons damaged shall have their action against the Master for the remainder.

S. 3. No Master of any such English ship being at sea, and having discovered any ship to be a Turkish ship, pirate or sea-rover, shall depart out of his ship.

S. 4. If the Master of any English ship, tho' not of the burden of 200 tons, or mounted with 16 guns, shall yield his ship unto any Turkish ship, pirate or sea-rover (not having at least his double number

ber of guns) without fighting, such Master shall be liable to all the penalties in this act.

S. 5. Upon process out of the Court of Admiralty it shall be lawful for all Commanders of his Majesty's ships, or the Commanders of any other English ships, to seize such ships or masters so offending, according to the process, and the same to send in custody into any ports of his Majesty's dominions, to be proceeded against according to this act.

S. 7. If the mariners or inferior officers of any English ship laden with goods shall decline or refuse to fight and defend the ship, when they shall be thereunto commanded by the Master, or shall utter any words to discourage the other mariners from defending the ship; every mariner, who shall be found guilty of declining, or refusing as aforesaid, shall lose all his wages due to him, together with such goods as he hath in his ship, and suffer imprisonment, not exceeding 6 months, and shall during such time be kept to hard labour for his maintenance.

35. A ship put into Boston in New England, and there the Master took up necessaries, and gave a bill of sale by way of hypothecation, and now there being a suit against the ship and owners to compel repayment, a prohibition was moved for; and the Court held, that the Master could not by his contract make the owners personally liable to a suit, and therefore as to them granted a prohibition, but as to the suit against the ship denied a prohibition, for the Master can have no credit abroad, but upon giving security by hypothecation, and it is not reasonable to hinder the Court of Admiralty to give a remedy, where we can give none ourselves. 1 Salk. 35. Trin. 2 Annæ. B. R. Johnson v. Shippen.

6 Mod. 79.
S. C. by
name of
Johnson v.
Shepney.

36. 1 Ann. Stat. 2. cap. 9. s. 1. If the principal be convicted of felony, stand mute, or challenge peremptorily above 20 jurors, the accessory may be proceeded against as if such principal felon had been attainted, notwithstanding such principal be admitted to his clergy, pardoned, or otherwise delivered before attainder; and such accessory, if he be convicted, or stands mute, or challenges, as aforesaid shall suffer as if the principal had been attainted.

37. 11 Geo. 1. cap. 9. s. 5. If any owner of, or captain, master, officer or mariner belonging to any ship, shall wilfully cast away, burn, or destroy the ship, or direct, or procure the same to be done, with intent to prejudice any person, that shall have underwritten any policy of insurance thereon, or any merchant that shall load goods therein, or any owner of such ship; the persons offending being thereof convicted, shall be adjudged felons, and suffer without benefit of clergy. [343]

38. He is not to import into, or export out of, any the English plantations in Asia, Africa, or America, but in English or Irish vessels, or of the vessels built and belonging to that country, island, plantation, or territory; the Master and three fourths of the mariners to be English, upon the forfeiture of ship and goods; and if otherwise, they are to be looked upon as prize, and may be seized by any of the King's officers and commanders, and to be divided as prizes according to the orders and rules of sea. 2 Molloy. 237. cap. 2.

What ships
and mari-
ners to make
use of.

39. All

39. All goods of the *growth* of his Majesty's plantations are not to be imported into England, Ireland, or Wales, Island of Jersey, or Guernsey, but *in such vessels as truly belong to owners that are of England, Ireland, Wales, Jersey, or Guernsey*, and three fourths at least of the mariners are to be English, upon forfeiture of ship and goods. 2 Molloy. 237. cap. 2.

40. Master of a ship has the power of *choosing the sailors*, and not the owners; for when the part-owners had made the defendant Master they could not put any servants upon him without a special agreement for it, for breach whereof an action would lie, for the very making him Master impowers him to choose his servants, for *he is answerable for all events*, and therefore but reasonable he should have liberty of choosing such men as he can confide in, and for whose honesty and diligence he may take security; and the owners have no means to avoid it but to recal the Master's authority; and it is one of the inconveniencies of jointenancy, that one alone cannot do that; judgment pro defendente. 12 Mod. 434. Mich. 12 W. 3. Rofiere v. Sawkins.

Tackle.

41. When a Master freights a ship, he ought to *shew his merchants the cordage* that belongs to her, and, if they see any thing amiss or wanting, he must rectify it; for, *if for want of good cordage, any pipe, hoghead, or other vessel should happen to be spoiled or lost*, the Master and mariners ought to *make it good to the merchants*. So also, if the ropes or slings break, the Master not having shewed them to the merchants, he must make satisfaction for the damage; *but if the merchants say, that the cordage is good and sufficient, and rest satisfied therewith, and afterwards it happens that they break*; in that case *each of them shall share the damage*, viz. the Merchant to whom the goods belong, and the said Master with his mariners. Miede's Laws of Oleron. 6. f. 10.

42. A vessel being laden with wines, or other goods, and hoysing sail at Bourdeaux, or any other place, if the Master and his mariners have *not trimmed their sails as they ought to have done*; and it happens that ill weather overtakes them at sea, so that the *main-yard shakes or breaks one of the pipes or hogheads*; the ship being arrived at her port of discharge, the merchant says to the Master, that by reason of his main-yard his wine was lost; in that case, if the Master replies, it was not so, both *he and his mariners* (be it four or six, or such of them as the merchants shall think best) *must take their oaths, that the wine was not destroyed by them, nor by the main-yard, or through their default*, as the merchants charge them, and then the said Master and his mariners shall be acquitted thereof. But, if they refuse to make oath to that effect, they are then obliged to make satisfaction for the same; for they ought to have ordered their sails aright, before they sailed from the port where they took in their lading. Miede's Laws of Oleron. 11. f. 11.

(B) Chargeable. In what Cases.

1. IF a Master set forth his ship for to take in *certain charge or* lading, and then *takes in any more, especially of other men*, he is to lose all his whole freight; for by other men's lading, he may endanger the merchants goods divers ways. And in such case, when goods by storms are *cast overboard*, it shall not be made good by contribution or average, but by the master's own purse; for if he * *overburthen* the ship above the true mark of lading, he is to pay a fine. Mal. Lex Merc. 99.

S. P. 2 Molloy. 258. But if the goods are brought into the ship secretly against his knowledge, it is otherwise; and goods so brought in

may be subjected to what freight the Master thinks fitting.——* He must not *overcharge* or lade his ship *above the birth-mark*, or take into his ship any person of an obscure or unknown condition, without letters of safe conduct. 2 Molloy 232. cap. 2.

2. If a ship do enter into any other port or harbour than she was freighted for against the Master's will, as by a storm, or by some force, then the goods shall be transported to the port conditioned on the Master's charges; but this must be *tried by the Master's oath, and two of the mariners*, or else the Master may be in further danger. Mal. Lex Merc. 99.

3. Such is the duty of a Master of a ship that is provident, that he ought not to make sail, and put forth to sea without the advice and consent of the most part of his company, especially when the weather is stormy, otherwise he shall answer the damages that cometh thereby; principally if he have not provided an expert pilot, or if the ship happen to fall over in the harbour. Mal. Lex Merc. 102. cap. 22.

Molloy 232. cap. 2. f. 4. S. P. Nor must he stay in port or harbour, without just cause when a fair wind invires his

departure.——But if the ship's company differ in opinion. as to sailing or not, the Master is to concur with the major part. Miece's Laws of Oleron, 4. f. 2.

4. The Master shall be punished also by damages, if the *over-loop* of the ship be *untyth*, or the pump be faulty, or a sufficient covering be wanting, especially for corn, victual, or such like commodities. Mal. Lex Merc. 103. cap. 22.

5. The Master is not bound to render an account of all to the owners; as for passengers which are found unable to pay. Mal. Lex Merc. 121. cap. 30.

6. When any goods or merchandises are delivered unto the Master, or his clerk the purser of the ship, and laid within board, or to the ship side, both ways is at the Master's peril. But the Master is not bound to answer for such things as are put in his ship * without his and his company's knowledge; because where men are found ignorant, they are also esteemed not to consent. Mal. Lex Merc. 103. cap. 22.

S. P. For the very lading them aboard makes them liable, and that as well by the common law as the law ma-

rine. 2 Molloy 246. cap. 3. f. 14.——But if the merchant or passenger keeps his goods by himself, as monies or such things in his coffers, and then finds fault to have lost them: then the Master and Company are to purge themselves by their oath; but if afterwards, notwithstanding they be found guilty, the denier shall pay the double, and also be punished for perjury. Mal. Lex Merc. 103. cap. 22.

Goods secretly brought in, and not entered in the purser's book, or bills of lading, the Master is not responsible for, unless it be such as the parties bring into the ship about them, as cloaths, money, and

and the like, which are seldom entered; and most commonly those that are visible he is answerable for. Molloy. 248.

So if the Master *forewarns a passenger to keep his goods, and that he will not take care thereof*, if they be lost or purloined by the crew; it is held, that he is not answerable for the same, especially if there be any agreement. Ibid.

But if goods be *sent aboard*, and the Master *appoint a cabin for the same, and deliver the key to the lader*, and tells him he will not be answerable if a loss happens, yet if goods are stolen he must make satisfaction. Ibid. 249.

[345] 7. The Master is liable for all *damages sustained by bad books, ropes, blocks or lines*, if the mariners do give notice of it, and they shall bear their parts in the damage, and so is he also to answer any damage happening by *unreasonable stowing or breaking of goods*, and therein he and his company may be put to their oath. Mal. Lex Merc. 103. cap. 22.

For if any damage happens by the delivery of the goods into the lighter, as that the ropes break, and the like; there he must answer; but if the lighter comes to the wharf or key, and then in taking up the goods, the rope breaks, the Master is excused, and the wharfinger is liable. 2 Molloy. 233. cap. 2.

He hath by the common law no property either general or special by 8. Whatsoever shall happen through *fault, negligence, or chance, which might be avoided, or if it be done by the passengers, or other than himself and his company*, the Master is answerable. Mal. Lex Merc. 103. cap. 22.

the constituting him Master; yet, as an officer, he must render an account for the whole charge, when once committed to his care and custody, and on failure make satisfaction; and therefore for misfortunes happening, either through negligence, wilfulness, or ignorance of himself or mariners, he must be responsible. Molloy. 229—3 Mod. 323.

But concerning the suing for the said goods, the Master may well do it, as the merchant 9. If by the Master's default *confiscation of goods, or other damages happen for non-payment of custom, or false bills of entries in the custom-house for goods, or for transporting of unlawful goods*, the Master shall answer for the same with the interest. Mal. Lex Merc. 103. cap. 22.

may pursue for spoiled goods. And notwithstanding, if it shall be found, that *the merchant is in any fault concerning the goods, as aforesaid*; then if the Master, and four of his company mariners swear no fault to have been in them, the Master shall be cleared thereby. Mal. Lex Merc. 103. cap. 22.

Molloy. 231, 232. cap. 2. s. 2. cites S. C. — Tho' the Master is not strictly the exporter, yet as to port duties the Master is always looked on as such, and is the person answerable; for to put them to seek the merchants to

10. Error of a judgment in B. R. in *assumpsit* brought by the mayor and commonalty of L. against H. where they declared of a custom, that they and their predecessors, mayors, &c. have had of every Master of a ship 8d. per tun for every tun of cheese brought from any place in England to the port of London ab oriente de London-bridge in the name of *weighage*; and that the defendant being Master of a ship had brought to the port of London so many tuns, which at that rate came to so much, which he had not paid; upon non assumpsit, verdict and judgment was for the plaintiff, whereupon H. brought a writ of error, and assign'd for error, that the action did not lie against the Master, but that the duty is due by the merchants, owners of the goods: but the judgment was affirmed; for the Master is intrusted with the goods, and hath a recompence from the merchants for bringing them, and is responsible for them, and therefore shall be charged for the duty; and it would be infinite to search for the owners of

of the several goods, which are all in the custody of the Master, who brought them into port, and therefore he shall be charged. 3 Lev. 37, 38. Mich. 33 Car. 2. C. B. Mayor &c. of London v. Hunt.

answer duties is impracticable, and it is but reasonable the Master

should pay a duty for the benefit of the port, and that the town should have the duty who are to maintain the port. 1 Salk. 249. Mich. 10 W. 3. B. R. Vinkestone v. Edden.

11. If a Master shall *weigh anchor*, and stand out to his voyage *after the time covenanted* or agreed on for his departure, if any *damage happen* at sea after that time; he shall refund and make good all such misfortune. Molloy. 255.

12. So soon as merchandizes and other commodities are put aboard the ship, whether she be riding in port, haven, or any other part of the seas, he that is exercitor navis is chargeable therewith; and if the same be there lost, or *purloyned*, or *sustain any damage*, hurt or loss, *whether in the haven* or port before, or *upon the seas* after she is in her voyage, *whether it be by mariners or by any other through their permission*, he that is exercitor navis must answer the damage, for that the very lading of the goods aboard the ship does subject the Master to answer the same; and with this agrees the common law, where it was adjudged, that ** goods being sent aboard a ship, and the Master having signed his bills of lading for the same, the goods were stowed, and in the night divers persons, under the pretence that they were preb-masters, entered the ship and robbed her of those goods; the Merchant brought an action at common law against the Master; and the question was, whether he should answer for the same? for it was alleged on his part, that there was no default or negligence in him; for he had a sufficient guard, the goods were all lock'd up under hatches, the thieves came as preb-masters, and by force robbed the ship, and that the same was vis major, and that he could not have prevented the same: and lastly, that tho' he was called Master, or exercitor navis, yet he had no share in the ship, and was but in the nature of a servant acting for a salary. But notwithstanding it was adjudged for the plaintiff; for at his peril he must see that all things be forthcoming that are delivered to him, let what accident soever happen, (the act of God, or an enemy, perils and danger of the seas only excepted); but for ‡ fire, thieves, and the like, he must answer, and is in the nature of a common carrier; and that though he receives a salary, yet he is a known and public officer, and one that the law looks upon to answer, and the plaintiff hath his election to charge either Master or Owners, or both at his pleasure, but can have but one satisfaction. 2 Molloy. 230, 231. cap. 2. l. 2.*

* This was a trial at Bar, and Hale Ch. J. said, that the Master is exercitor navis, and if in this case the Court should let loose the Master, the Merchant would not be secure. And if they should be too quick upon the Master, it might discourage all Masters; so that the consequence of this case is very great; but the jury gave a verdict for the defendant, the Court inclining that way. Mod. 85. Mich. 22 Car. 2. B. R. Mors v. Sluce. — The Court inclin'd strongly for the defendant, there not being the

least negligence in him. Vent. 191. Hill. 23 & 24 Car. 2. B. R. S. C. — But afterwards in Hill. 24 & 25 Car. 2. it was adjudged for the plaintiff by the opinion of the whole Court; the reasons whereof were delivered by Hale Ch. J. That tho' by the ** admiral civil law, the Master is not chargeable *pro damno fatali*, as pirates, storm, &c. but where there is any negligence in him, he is, yet *this case is not to be measured by the rates of the admiral law, because the ship was infra corpus comitatus*. And the first reason for his being liable is, because he takes a reward, and the usage is to pay him half-wages before he goes out of the country. 2dly, If he would be might have had a

caution for himself, which he omitting, and taking in the goods generally, he shall answer for what happens. 3dly, To excuse the Master, a difference must be shewn between him and a common heyman, carrier, or inn-holder. [But as to that there is no difference between him and a boyman. 2 Lev. 68 S. C.] He is *† rather an officer than a servant*, as he may impawn the ship, and sell bona peritura; and as to an objection of the Master's *receiving wages from the Owners*, he answered, that in effect, the *Merchant* pays him; for he *pays the Owner's freight*, so that it is but handed over by them to the Master; if the freight be lost, the wages are lost too; for the rule is, freight is the mother of wages: so that tho' the declaration is, that the Master received wages of the merchant, and the verdict is, that the owners pay it, it is no material variance. Vent. 238, 239. S. C.—Adjudged 2 Lev. 69. S. C.—Resolved for the plaintiff. Raym. 220. S. C.—* But by our law, case lies against him for goods lost, tho' without his default. 2 Jo. 69. S. C.—S. P. Because he was a public officer, and because his salary is part of his hire, and did arise from his care and diligence to be taken for the safe custody of the goods; per Holt Ch. J. 12 Mod. 481. cites S. C.—But if the ship had been robbed *at sea*, the Master had not been answerable, tho' he was chargeable at land; per Holt Ch. J. 12 Mod. 484, cites S. C.—Ibid. 490.—S. P. Whether by *enemies, ships of reprisal, or pirates*; for there, if no fault or negligence was in him, but that he performed the part of an honest, faithful and valiant man, he shall be excused. 2 Molloy 232. cap. 2.—S. C. cited by Holt Ch. J. in Case of Boson v. SANFORD, & al. And held clearly, that tho' the Master is chargeable in respect of his wages, so are the Proprietors likewise in respect of their freight, which they receive for the portage of the goods, at the election of the plaintiff. 3 Lev. 258, 259.—† Eyre J. held, that there is no difference between a land-carrier and a water-carrier, and that the Master of a ship was *no more than a servant to the Owners* in the eye of the law; and that the power he has of hypothecation, is by the civil law. 2 Salk. 440. in Case of Boson v. Sandford.

‡ 2 Vent. 191. Arg. says, that he is not liable in case of fire, or sinking of the ship.

S. P. For if once the mariners have taken charge of them the

Master becomes immediately responsible, if they steal, lose, damnify, or imbezil them. 2 Molloy 247. cap. 3. f. 15.

13. If the *Master shall receive goods at the wharf or key, or shall send his boat for the same, and they happen to be lost*, he shall likewise answer both by the marine law; and the common law. 2 Molloy 231. cap. 2. f. 2.

14. If goods be laden aboard, and after an *embargo* or restraint from the Prince or State *comes forth*, and then he breaks ground, or *endeavours to sail away*, if any damage accrues, he must be responsible for the same. The reason is, because his freight is due and must be paid; nay, altho' the very goods be *seised as contraband goods*. 2 Molloy 232. cap. 2. f. 3.

[347] 15. He ought not to *lade* any of his *merchants goods aboard* any of the King's *enemies ships* (admitting his own vessel leaky or disabled) without letters of safe conduct; otherwise the same may be made prize, and he must answer the damage that follows the action. 2 Molloy 232. cap. 2.

16. Nor shall he come, or *sneak into the creeks* or other places, *when laden homewards*, but into the King's great ports, (unless he be driven in by tempest); for otherwise he forfeits to the King all the merchandize, and therefore must answer. 2 Molloy 232. cap. 2.

17. He must *not lade* any *prohibited* or unlawful goods, whereby the whole cargo may be in danger of confiscation, or least subject to seizure or surreption. 2 Molloy 232. cap. 2.

18. After his arrival at port he ought to see that the ship be *well moored and anchored*; and after *re-laded*, not to depart or set sail, till he hath been cleared; for if any damage happens by reason of any fault or negligence in him or his mariners, whereby the merchant or lading receives any damage, he must answer the same. 2 Molloy 233. cap. 2.

19. He

19. He must not set sail with *insufficient* rigging or *tackle*, or with other or fewer cables than is *usual* and requisite, *respect* being had to the burthen of the vessel. 2 Molloy 233. cap. 2.

20. If *fine goods* or the like are put into a *close lighter*, and to be conveyed from the ship to the key, it is usual there, that the Master send a competent number of his mariners to look to the merchandize, if then any of the goods are lost and imbezeld, the Master is responsible, * and not the wharfinger; but if such goods are to be sent aboard a ship, there the wharfinger, at his peril, must take care the same be preserved. 2 Molloy 233. cap. 2.

* Pasch. 26 Car. rul'd at Guild Hall, by L. C. J. Hale.

21. And as the law ascribes these things and many more to him as faults, when committed by him or his mariners in ports, so there are other things, which the law looks upon to be as faults in him in his voyage, when done. 2 Molloy 233, 234. cap. 2.

As if he deviates in his course without just cause, or steers a dangerous and

unusual way, when he may have a more secure passage; though to avoid illegal impositions, he may somewhat change his course; nor may he sail by places infested with pirates, enemies, or other places notoriously known to be unsafe, nor engage his vessel among rocks, or remarkable sands, being thereto not necessitated by violence of wind and weather, or deluded by false lights. 2 Molloy 234. cap. 2.

22. The Master shall not be answerable for the contracts of their mariners, but they may be detained for their crimes. 2 Molloy 234. cap. 2.

23. Master of a ship went a trading voyage beyond sea, and died; the succeeding Master open'd his effects, in the presence of the crew; and then sent a letter with a bond inclosed to the widow, wherein he bound himself to answer to her the sum of 300l. if the ship arrived safe; the sum the deceased left, being 200l. which was the rate of respondentia bonds there. The Master traded, and made 300l. per cent. of the money. The question was, whether he should be bound to any more than this bond, or answer to the widow the profits of the money made in way of trade? The Counsel for the widow, and the Ld. Keeper too, thought it differ'd from the case of an executor; because the ship was to go a trading voyage, and the money was designed to be laid out in trade, and the succeeding Master is in effect, but a trustee for the representative of the former. And they held, that if he traded with the money as with his own with care and prudence, and then through any accident the money was lost, he would not be accountable. It was therefore decreed, that he should account to the widow for the profit made by the trade, deducting reasonable allowance for labour and skill. The Ld. Keeper thought this resolution necessary for the encouragement of trade; it being a comfort to a man to know, that if he should die, the improvement of his effects in the way of trade by the succeeding Master should be for the advantage of his family. 10 Mod. 20, 21. Pasch. 10 Ann. in Canc. Brown v. Litton.

24. On the hypothecation of the Master, the ship is suable in [348] the Admiralty, but the owners are not. 1 Salk. 35. Trin. 2 Ann. B. R. Johnson v. Shippin.

25. A Master of a ship is discharged of goods, when he lands them

them at the custom-house, and gives the proprietor notice. MS. Tab. cites 5 March. *Eggletham v. Partyes*.

26. Master of a ship takes upon him to *sell the ship at an undervalue to the agent of the E. Ind. Company*. This is a breach of trust in the Master, and decreed that the *E. Ind. Company shall answer for the real value of the ship and cargo, but not for possibility of gain*. MS. Tab. cites 1 December 1718. *East India Company v. Ekins*.

(B. 2) Owners. How far bound by his Contract or Default.

If the owner had been party, and had covenanted that there should be such proceedings in the voyage, he should on non-performance thereof have been liable to the damages. And the valuation of the ship in the latter clause, viz. obliging the ship to the performance, would not excuse or lessen the damage, and the Owner by assent to the act or agreement of the Master obligeth himself; per *Keck. 2 Ch. Cases 239.* in the S. C. Anon.

1. A. A Master of a ship, of which B. was owner, treated with J. S. for taking the ship to freight at 80 tons to sail from London to Falmouth and thence to Barcelona without altering the voyage, and there to unlade, at a certain rate per ton. And to perform this, the Master and Merchant (J. S.) execute a charter party, but B. was no party thereto; and by the charter party the Master obliges the ship, and what was therein valued at 300l. The Master deviates and commits barrettry, and the Merchant in effect loseth his voyage and goods. For the merchandize being fish, came not till Lent was past, and was rotten. Sentence was given against the Master and ship, in the Court of Admiralty at Barcelona, and affirmed on appeal to a higher Court. The ship coming to the merchant's hands the owner brought trover. The merchant brought a bill to stay this suit, and another was brought by the owner for freight, and claim'd deductions out of both for his damages sustained by the Master's breach of articles. For if the Owner gives authority to the Master to contract, or allow his contract, he shall be liable to loss as well as gain, by occasion of that contract, and if he will have the gain, viz. the freight by the Master's contract; he shall also bear the loss. And *Ld. Chancellor* held, that because the charter party valued the ship at a certain price, the Owner should not be obliged further, and that only with relation to the freight, not to the value of the ship; and that the Master is liable for deviation and barrettry, but not the Owners, else masters should be owners of all men's ships and estates; and decreed accordingly. 2 Ch. Cases 238, 239. Mich. 29 Car. 2. Anon.

2. Where the ship is well engaged, she is for ever obliged, and the Owners are concluded thereby till redemption. 2 *Molloy* 236. cap. 2.

3. Master of a ship is but a *servant to the Owners, and if he buys provisions on tick, tho' he has money from the Owners, the Owners are liable to the debt in proportion to their several shares in the ship. *Hill. 1769. 2 Vern. R. 643. Speering & al. v. Degrave, Gallway & al.*

* S. P. by the common law, and he hath no power over the ship; the power which he hath is by the civil law. Per *Eyre J. Show. 102. Boson v. Sandford—cites Hob. 111.—* He is rather an officer than a servant. *Vent. 238. Morse v. Slue.*

4. In a voyage the Master of a ship is the Owner's servant, and his duty requires him to provide necessaries for the ship, and it is the Owner's interest that they should be provided; therefore *what the Master necessarily takes up (tho' not upon bottomry), and employs for that purpose, the Owners must pay.* M.S. Tab. cites 27 March 1710. Cary v. White.

(C) Actions &c. by him.

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1. **I**F any man *compel the Master to overburthen* the ship or boat, he may therefore be *accused criminally*, and pay the damages happening thereby. Mal. Lex Merc. 99.

2. Either Master or Owners may bring an action for the freight. Per Cur. 2 Salk. 440. Mich. 1 W. & M. B. R. in Case of Boson v. Sandford. 1 Show. 30. S. P. in S. C.

3. Master of a ship is in many respects suable, and may sue in *things concerning the ship* as well as the Owner, and what the Master recovers in this action is to the use of the Owners; per Holt. 12 Mod. 383. Pasch. 12 W. 3. in Case of Mikes v. Caly. And the Master may bring action against any merchant for freight
in his own name. Ibid.—*But quatenus Master* he cannot bring *trover for the ship.* Ibid.—*But* he may have *case* if by a *seizure* of the ship he be *hindered of his voyage.* Ibid.—*And he shall* have *trespass* for a *disturbance of him in his office.* Ibid.

4. Case by Master of a ship *against a person who distrained corn* with which the ship was freighted, *whereby he lost his voyage*, will lie; or he may have *trespass* and declare on his possession. 12 Mod. 381. Pasch. 12 W. 3. Mikes v. Caly.

5. It is mere indulgence to mariners to sue for wages in the Admiralty, but if the Master *sues for wages* there a prohibition shall go; for he contracts on the credit of the owners, but the mariners on the credit of the ship. 1 Salk. 33. Trin. 12 W. 3. Clay v. Sudgrave. Carth. 518. S. C.

(D) Actions against him.

1. **I**F an *infant* being Master of a ship by contract with another *take upon him to bring certain goods from St. Christopher's to England, and there to deliver them*, but *delivers them not* according to agreement, but wastes and consumes them, he *may be sued in the Admiral Court, altho' he be an infant*, for this suit is but in nature of a *detinue*, or a *trover and conversion* at the common law, and a prohibition denied for that cause. 2 Molloy 234. cap. 2. l. 13.—cites Furnes v. Smith. 1 Roll. Abr. 530.

2. Where a *ship is lost* by the Master's neglect, *trover* lies not against him, but a *special action on the case*; the storm by which the ship was lost cannot be material in *trover*, but if defendant sold the share of the ship before the *storm*, then *trover* well lies, tho' the Master were appointed by the part owners. Cumb. 371. per Holt Ch. J. 8 W. 3. B. R. Anon.

(E) Actions, Pleadings, and Evidence.

So that he shall not infer, that such or such a sad disaster has happen-

ed, or been

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1. **B**Y the marine law, he, that will charge a Master with a fault as in relation to his duty, must *not* think that a *general charge* is sufficient in law, *but* he ought to assign and *specify* the *very fault* wherewith he is so charged. 2 Molloy 234. cap. 2. §. 13. *itself, but must also prove that that fault did dispose to such a sad event; or that such a misfortune could not have happened without such a fault precedent.* 2 Molloy 234. cap. 2. §. 13.

2. What is *taken from* the Master *in relation to the ship*, he shall have *case or trespass* for at his election, with this difference, that if he bring trespass he must *declare upon his possession*. Per Holt. 12 Mod. 383. Pasch. 12 W. 3. in Case of Mikes v. Caly.

[For more of Master of a Ship in general, see Hypothecation, Mariners, and other proper Titles.]

Master of the Rolls.

(A) His Power &c.

1. **B**Y the statute of 21 H. 8. c. 13. there are 12 Masters of Chancery. P. R. C. 233.

2. The honourable the Master of the Rolls is one and the chief. P. R. C. 233.

3. His patent is for life; in it he is stiled Clericus parvæ bagæ, Custos rotulorum, & Custos domus converforum judæorum. P. R. C. 233.

4. He taketh in open Court his oath, which is ordained by the 18 Ed. 3. and is as follows:

5. You shall swear, that well and lawfully you shall serve our sovereign Lord the King and his people in the office of Clerk of the Chancery, to which you are intitled; you shall not assent to, nor procure the King's disherison, nor perpetual damage to your power; nor shall you do, nor procure to be done, any fraud to any man's wrong, nor any thing that toucheth the keeping of the seal, And you shall lawfully counsel in things which touch the King

King when you shall be thereunto required; and the council which you know touching him you shall conceal; and if you know of the King's disherison, or perpetual damage, or fraud to be done upon things which touch the keeping of the seal, you shall use your lawful power to redress and amend it; and if you cannot do the same, then you shall certify the Chancellor, or others which may cause the same to be amended to your intent. P. R. C. 233, 234.

6. He is *keeper of the records, judgments, and decrees*, of this Court. P. R. C. 234.

7. The *records and rolls* of Chancery since the beginning of Richard the 3d's time are kept in the Chapel of the Rolls, the rest are kept in the Tower of London. P. R. C. 234.

8. The Master often *sits in Court with the Lord Chancellor or Keeper*, and in his absence *hears and determines causes* there; and in the evenings, and at other times, when the Court at Westminster, or elsewhere before the Lord Chancellor or Keeper is not sitting, hears and determines causes at the Rolls. P. R. C. 234.

9. Cardinal Woolsey (who was Chancellor the 29 H. 8.) is said to have introduced the Masters judging in causes in the Lord Chancellor's absence; and the Ld. Coke in the preface to his third report says, he cannot conceive that the Master of the Rolls has a lawful authority so to do, or to determine causes at the Rolls (as of later times has been used), unless he be authorised by special commission under the great seal; which it seems he now is. P. R. C. 234, 235.

But heretofore, when he had no such commission, the acts done by him were entered as done either per Curiam or per Cancellar. P. R. C. 235.

10. He has a long time been *ranked with the great officers of the realm*, as appears by the statute 12 R. 2. c. 2. where it is enacted, that the Chancellor, Treasurer, and Keeper of the Privy Seal, the Steward of the King's house, the King's Chamberlain, the Clerk of the Rolls, the Justices of both Benches, the Barons of the Exchequer, and others that should be called to the naming of justices of the peace, sheriffs, escheators, customers, comptrollers, &c. should be sworn to do the same faithfully, and without affection. P. R. C. 235. [351]

11. He hath *great power and preheminance by prescription, statutes, and commission*. P. R. C. 235.

12. Some have been of opinion, that by his office he is a *general conservator of the peace*; but it is said he *makes out process, and takes recognizances thereupon*, not by any power incident to his office, but by *prescription*. P. R. C. 235.

13. The Master of the Rolls does yearly, from time to time, transmit in estreats of parchment, prest writ, in a conform measure, and of one size written on the one side only, all and singular charters, letters patents, writs-close, commissions, licences, &c. out of the said patent rolls, and the same estreats the King's Chancellor, or the said Master of the Rolls for the time being, shall deliver in their own persons yearly to the Barons of the Exchequer in the Terms of Michaelmas and Easter for execution and

and process to be had and made thereupon for the King. *Gib. Hist. Exch. 229, 230. cap. 7.*

14. A decree made by the Master of the Rolls alone without the assistance of two Masters in Chancery was allowed to be error. *Vern. 273. Mich. 1684. Smith v. Turner.*

15. 3 Geo. 2. cap. 30. All orders and decrees made by the Master of the Rolls, except orders and decrees of such nature as according to the course of the Court ought only to be made by the Lord Chancellor, Lord Keeper, or Lords Commissioners, shall be deemed valid orders and decrees of the Court of Chancery; subject nevertheless to be discharged, or altered by the Lord Chancellor, &c. so as no such orders or decrees be inrolled, till the same are signed by the Lord Chancellor, &c.

(A) Maxims.

It is a sure foundation or ground of art, and a conclusion of reason, so called quia maxima est ejus dignitas & certissima autoritas, atque quod maxime om-

1. MAXIMS are the foundations of the law and the conclusions of reason; and therefore ought not to be impugned, but always to be admitted; but they may by reason be conferred and compared the one with the other, tho' they do not vary, or it may be discussed by reason which thing is nearest the maxim, and the mean between the maxims, and which is not; but the maxims can never be impeached or impugned, but ought always to be observed, and held as firm principles and authorities of themselves. *Pl. C. 27. b.*

It is a sure foundation or ground of art, and a conclusion of reason, so called quia maxima est ejus dignitas & certissima autoritas, atque quod maxime omnibus probetur, so sure and uncontrollable, as that they ought not to be questioned; and is what is elsewhere called a principle and is all one with a rule, a common ground, postulatum or axiom. *Co. Litt. 10. b. 21. a.*—And its being called a principle or principium is as much as to say primum caput, from which many cases have their original or beginning, which is so strong, as it suffereth no contradiction, and therefore it is said in our books, *contra negantem principia non est disputandum.* *Co. Litt. 343. a.*

2. The alterations of any of the maxims of the common law are most dangerous. *2 Inst. 210.*

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3. The laws of all nations are doubtless raised out of the ruins of the civil law, as all governments are sprung out of the ruins of the Roman empire, and it must be owned that the principles of our law are borrowed from the civil law, and therefore grounded upon the same reason in many things; per Holt Ch. J. *12 Mod. 482.*

[For more of Maxims there will either be added a collection of them with references to all the books of law down to this time at the end of this work; or a distinct treatise will be printed of them.]

. Actius

Melius Inquirendum.

(A) *What it is, and the Effect thereof.*

1. A Tenure is found of the King as of his manor of Dale by 3s. a melius inquirendum finds a tenure by knight's service of the King; this is a tenure by knight's service of the said manor, and not in capite; for the melius only *supplies that which was defective.* Jenk. 296. pl. 48.

The melius inquirendum is in its own nature at the common law to be a supplement to a

defect or uncertainty of a former office, and so the tenure being found certainly here to be of the King as of a manor, and by some service certain, and the uncertainly only for some other part, when the melius inquirendum comes it perfects that, and so makes but one office and must be joined together. And as to the Case in D. 292. Trin. 12 Eliz. where it is resolved, that an office being found that lands were held of the Queen, but per quæ servitia ignorant, and thereupon a melius inquirendum was awarded, whereby the tenure was found to be of a subject, that now the first office was void and the melius inquirendum was in the nature of a diem clausit extremum, it was said, that this was nothing to the purpose; for that was not a melius inquirendum at common law, but grounded upon the statute of 2 E. 6. and taking his nature and force from thence; therefore the resolution is expressly that the melius inquirendum there is as the first office and absolute in itself by the sense of that statute, which is but in two cases mentioned in the statute. Resolved by Hobert and Tanfield in the Court of Wards, absente Coke. Hob. 50. pl. 56. Inche v. Roll.

2. A melius inquirendum issues upon an office found virtute brevis de mandamus: the said melius inquirendum *ought not to restrain the inquiry* to any tenure, although it be of the King; but shall leave the inquiry without any *restriction. The want of the words coram escheatore, in the writ of mandamus does not vitiate it; for the writ of mandamus ought to be before the escheator, and cannot be otherwise. Jenk. 294. pl. 42. (bis).

* For such restriction is both without precedent and prejudicial to truth; per Hobart and Tanfield, absente

Coke, in the Court of Wards. Hob. 73. Curtice's Case.

3. A melius inquirendum will never support a *defective inquiry.* 3 Mod. 336. Hill. 2 W. & M. B. R. The King v. the Warden of the Fleet.

If defective in the points found; but if it find some things

well, and nothing as to others, it may be supply'd by a melius inquirendum. 2 Salk. 469. Hill. 3 W. 3. B. R. Linch v. Coote.

(B) *Grantable. In what Cases, and how.*

1. THE writ of melius inquirendo lieth, where the first office is found by virtue of a writ of diem clausit extremum, the *which office wanteth certainty in divers points*, as in the tenures of divers lands, or in the value of any of them &c. then shall issue forth such writ of melius inquirendo. But if the *first office be found*

* S. P. per Cur. 12 Mod. 496. Pasch. 13 W. 3. the [353] King v. Atkinson.—
S. P. But upon office found *virtute* *found by the escheator* * *virtute officii sui*, and not by virtue of any writ or commission, and the office wanteth certainty in divers things, as before; then a melius inquirendo shall not issue forth, but the office and inquisition returned shall be as † void, because it is not found by virtue of any commission or writ, but only ex officio of the escheator, without any command to him to do the same; and therefore the same shall be taken as void, if it want certainty in any point. F. N. B. 255. (B).

brevis vel commissionis; for melius inquirendum shall not be awarded where they do not award the former writ. Br. Office devant &c. pl. 38. cites 4 E. 4. 22, 23.—† A melius inquirendum shall not issue after a void office. Arg. Mo. 218 Mich. 27 & 28 Eliz. in Mounson's Case.—D. 198. b. Marg. pl. 30. says it was so resolved. 2 Eliz.

* Defendant was outlaw'd at the suit of an after judgment-creditor, who got a lease from the Crown at a 2. A melius inquirendo shall be awarded upon a surmise made in Court, that the lands are of a * greater yearly value than is declared by the office. And upon like reason, upon a surmise made, that they are holden by other services, or that the tenant was seised of other lands or other † estate than is mentioned in the office, a melius inquirendo shall be awarded. F. N. B. 255. (D).

quarter part of the value, viz. for 120 l. per ann. where the lands were well worth 478 l. and he levied only the 120 l. per ann. and let the outlaw take the rest. The first judgment-creditor brought an *elegit*, and would have the lessee account for the whole value; but it was decreed (by which a former decree was set aside), that the lessee could levy no more than the extended value, which was at 120 l. per ann. and could not enter and take all the profits; for the Crown has no interest in the land extended, but only perception of profits, but the party may take out a *melius inquirendum*, and have them extended at a greater value. And it was agreed, that the lessee should change place, and let in the first judgment-creditor, and he pay the lessee 200 l. per ann. till lessee's debt be satisfy'd, and the outlawry to remain in force. And the extent upon the *elegit* after the extent upon the outlawry was held void quoad the protector. Hard. 106. Trin. 1657. Masters v. Whitfield and Holkin.—Cited and adjudged accordingly. Parl. Cases 72. Attorney General v. Baden.

† An office post mortem found that the person died seised of lands, but not what estate he died seised of in those lands. It was resolved by the three Lords Ch. J. assistants, that the said office is not utterly void, but may be supply'd by a melius inquirendum, as well to perfect what estate the deceased held, as of what estate he died seised; and it was decreed accordingly. Ley. 15, 16. Mich. 7 Jac. Nethersole's Case.

Note, that it is the ancient course in the Exchequer, that if it be 3. 2 & 3 E. 6. cap. 8. §. 8. enacts, That when the jury finds de quo vel de quibus &c. ignorant, or per que servitia ignorant, the first shall not make a tenure of the King, nor the last a tenure in capite, but in such case melius inquirendum shall issue forth.

found by office that J. S. was seised in fee, and dy'd, but of whom the tenements are held they do not know, that a commission shall issue to enquire certainly of whom &c. and if it be found that of W. N. then the party shall have ouster le main. But if office be found that it is held of the King, but by what services they do not know; this is good for the King, and it shall be intended to be held in capite by knights service; for the best shall be taken for the King, but now in those cases melius inquirendum shall be awarded by this statute. Br. Office devant &c. pl. 59. cites 30 H. 8.

A melius inquirendum is seldom or never granted, tho' in such case there are affidavits, that the party had his seises. It 4. It was found before the Coroner super visum corporis, that J. Harleston fell into a marlepit fortuito, and so died. Afterwards, by the procurement of the Queen's almoner, a commission issued out of the Crown Office (quasi in nature of a melius inquirendum) and was awarded to the sheriff to enquire of his death, and of what goods and chattles he was possessed at the time of his death, and it was found before the sheriff, that he was *felo de se* &c. It was moved, that this writ or commission was not well awarded,

awarded, but utterly void; for the *statute of 28 Ed. 3. cap. 9.* is expressly, that no such commission shall be granted; and that the sheriff shall not take indictment by writ or commission, and *F. N. B. R. 144. and 250.* agreeth therewith. But I've the clerk informed the Court that they have divers precedents since the statute of such commission awarded. *Cro. E. 371. Hill. 37 Eliz. in B. R. Harleston's Case.*

hath been granted where any fault is in the Coroner, or any uncertainty in the inquisition returned. This

writ is generally granted upon offices or tenures, and directed to the Sheriff, but never to a Coroner in case of a *felo de se*, who makes his inquiry *super visum corporis*; per Pemberton Serjeant. *3 Mod. 238. Trin. 4 Jac. 2. B. R. in Case of the King v. Bunny.*

5. If an office be found for the King, and upon a *melius inquirendum* be found for the King likewise, but not warranted by the writ, so that all is insufficient and void, a new writ of *melius inquirendum* ought to be granted. But if upon such former *melius inquirendum* it had been found against the King, he should not have a new *melius inquirendum*; 1st. Because then there would be no end of such writs. 2dly. If in a *diem clausit extremum*, or *mandamus &c.* it be found against the King, no such new writs shall issue, and so it shall be upon a *melius &c.* 3dly. If office be found for the King, the party grieved may traverse it, and if this traverse be found against him, this makes an end of the matter; so if it be found for him that tenders the traverse, this shall bind the King as to this matter. But if upon the *melius inquirendum* it be found for the King, yet the party grieved may traverse it. *8 Rep. 168. Hill. 7 Jac. Paris Stoughter's Case.*

But in good discretion a *melius inquirendum* shall not be [354] awarded after office found against the King without view of some record, or other pregnant matter for the King, for avoiding vexation to the subject.

8 Rep. 169. in Paris Stoughter's Case.

6. In an inquisition upon a *diem clausit extremum* the words of the verdict being, that part of the lands were holden so and so *pro aliquo ipsis juratoribus noto sive cognito in contrarium*, it was resolved, that it was insufficient, and not traversable, but to be supply'd by a *melius inquirendum*, especially because those words do not import any express affirmative verdict; and thereupon a commission in nature of a writ of *melius inquirendum* was awarded to inquire better of the tenure of the said lands so uncertainly found, and of all other the lands and hereditaments found in the said inquisition. *Ley. 10. 11. Trin. 7 Jac. Westcot and William's Case.*

S. P. Because the verdict was with the prout patet, whereas it ought to be full and direct. *13 Rep. 72. Trin. 7 Jac. in Cur. Ward, Westcot's Case.*

7. It was found that B. was seised of divers lands at the day of his death, but not found of what estate he was seised in those lands, nor that he died seised of such estate, nor any tenure by knight-service in chief or otherwise by knight's service was found thereby; but that he died 25th July last past &c. Whereupon a *melius inquirendum* issued, which likewise found not what the estate was, of which &c. but only that he was seised of such estate as appeared in the first inquisition. Whereupon issued a *quæ plura*, and then another *melius inquirendum*, which *quæ plura*, and last *melius &c.* and inquisition thereupon found being grounded on the former inquisition, wherein the King was not intitled to any lands at all, and so no cause to inquire of *plura* till a seisin found, the whole

An office not finding any dying seised, and finding a tenure of common persons only is merely void; but if any tenure in capite, or by knight's service had been found of the King, and no dying

seised, yet
the office
had not been
void but

voidable, and a melius inquirendum should have been awarded to inquire better of the estate whereof he was seised, and whether he died seised or no; but otherwise where no tenure is found of the King. Ley. 36. Pasch. 9 Jac. Shallock's Case.

whole was held to be void, and decreed accordingly. Ley. 22. Trin. 8 Jac. Barham's Case.

8. An inquisition post mortem found the land held of A. by 5 s. rent as of his manor of D. and a melius inquirendum found the same lands to be held of B. as of his manor of S. by the same services as in the former of A. It was held, that tho' in truth some part of the lands might be held of the King, yet no new melius inquirendum could be awarded to inquire better of the tenure of the said lands after the death of the same ancestor, unless there were a record to prove a tenure for the King, and then a sci. fa. would lie on the statute of Lincoln to seise the lands; but no new office or melius inquirendum could be; and it was decreed accordingly. Ley. 27, 28. Mich. 8 Jac. Gardiner's Case.

S. C. Vent.
181. Hill. 23
and 24 Car.
2. by name
of STAN-
LAKE'S
Case. And
Hale said,
where a Co-
roner hath
inquired, no
melius in-
quirendum
can go, as
upon an of-
fice found
after the
[355]
death of the
King's te-
nant; for
unless they
could take
some excep-
tion to the
inquisition
to quash it,

9. It was moved for a melius inquirendum to be granted to the Coroner of Kent, who had returned an inquisition concerning the death of one that was killed within the manor of Greenwich; he had returned that he died of a meagrim in his head, when he was really killed with a coach. Hales said a melius inquirendum is generally upon an office post mortem, and is directed to the sheriff. But Twisden said this cannot be to the sheriff; in 22 Ed. 4. the Coroner must enquire only super visum corporis. And if you will have a new inquiry, you must quash this. Indeed, a new inquiry was granted in * MILES BARTLY'S Case. It being prayed that the Court, being the supreme Coroner, would examine the misdemeanor of the Coroner, Hales Ch. J. bid them make some oath of his misdemeanor, because he is a sworn officer. Without oath we will not quash this inquisition. Newdigate said, that in the Case of MILES BARTLY the inquiry was not filed, and that that was the reason why a new one was granted. Hales ordered the Coroner to attend, who (he said) must take the evidence in writing; and that he should bring his examination into Court. Mod. 82 Mich. 22 Car. 2. B. R. Anon.

the Coroner could not enquire again; but if the misdemeanor of the Coroner were somewhat more clearly made out, the Court said they would set the inquisition aside, and cause a new one to be made. And the Court said, that in MICHAEL BARTHOLOMEW'S Case [which seems to be S. C. as MILES BARTLY here cited], and also in TOOMS'S Case it was proved that there was practice with the Coroner to suppress the King's evidence, and so the inquisition was set aside upon a male se gessit.—* 2 Sid. 90. 101. Trin. 1658. Michael Barclee's Case.

Skin. 45.
S. C.—
2 Jo. 198.
Pasch. 34
Car. 2. B. R.
and it is
there said,
the Ld. Ch.
J. Hale had
declared his
opinion that
it was tra-
versable.

10. Upon inquisition of a *felo de se* returned in B. R. by certiorari it was moved for a melius inquirendum on affidavit of melancholy and distraction; but held not grantable, unless there had been some irregularity in the caption of it; and ordered the administrator to traverse the inquisition, as is usual in the Exchequer in cases of inquests of office, as talis venit & queritur seipsum colore &c. gravari & minus rite &c. And agreed by all the Bench he might do so, but held by some of the Bar that it is not traversable. Upon action of trover for the deceased's goods,
it

it will hold good, and cannot be traversed. 2 Show. 199. Pasch. 34 Car. 2. B. R. The King v. Ripley.

11. The defendant was *felo de se*, and the Coroner's Inquest found him a *lunatick*, and now Mr. Jones moved for a *melius inquirendum*, but it was denied, because there was no defect in the inquisition, but the Court told him, that if he could produce an affidavit that the jury did not go according to their evidence, or of any indirect proceedings of the * Coroner, then they would grant it; but it was afterwards quash'd, because they had omitted the year of the King. 3 Mod. 80. Pasch. 1 Jac. 2. B. R. The King v. Hetherfal.

S. C. cited Carth. 73. Mich. 1 W. & M. B. R. in Case of the King v. Bonny.—
* If a Coroner's Inquest be quashed, the Coroner must take a new

inquest super visum corporis; but if a *melius inquirendum* be granted on a male se gessit of the Coroner, the new inquiry must be before the Sheriff or Commissioners, not super visum corporis, but upon affidavits; for none but the Coroner can inquire super visum corporis, and he is not to be trusted again; but when an inquisition is quashed, it is as if no inquisition had been taken. 1 Salk. 190. Mich. 1 W. & M. B. R. The King and Queen v. Bunney.—S. P. But where his inquisition is quashed for a defect in point of form only, he may and ought to take a new one in the like manner as if he had not taken any before. Hawk, Pl. C. 54. cap. 9. s. 53.

12. A. drowned himself in a pond, and the Coroner's inquest found him *non compos mentis*, because it is more generally supposed that a man in his senses will not be *felo de se*. And it was moved for a *melius inquirendum*, and that the inquisition might be quashed; for that it sets forth quod pred. defend. circa horam octavam ante meridiem in quoddam stagnum se projecit & per abundantiam aquæ ibidem statim suffocat. & emergit. erat, which is insensible. It was objected, that there is no exception taken to the substance of the inquisition, and the word suffocat. had been sufficient, if the word emergit. had been left out. The Court were of opinion, that there being another word in this inquisition, which carries the sense, it is therefore sufficient; but if it had stood singly upon this word emergit. it had not been good. 3 Mod. 100. Pasch. 2 Jac. 2. in B. R. The King v. Saloway.

(C) Grantable. At what Time.

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1. AFTER the inquisition is returned and filed, *melius inquirendum* shall not be granted so long as that inquisition is in force, and not quashed, for such an inquisition is not traversable; but an inquisition on a *melius inquirendum* may be traversed, because it is not taken super visum corporis; and this was agreed per tot. Cur. to be good law. Carth. 73. Mich. 1 W. & M. B. R. The King v. Bonny.

(A) Memorandum.

* S. P. per
Cur. 2 Lev.
12. Trin.
29 Car. 2.
Tatlow v.
Bateman.

1. UPON a motion in arrest of judgment for that this *action* was brought *by bill*, and the entry on the record &c. was with a general memorandum; *ff. Memorandum quod alias scil't. Term. Sanct. Mich.* and the plaintiff declared, that the defendant *falso & malitiose on such a day &c. indicted the plaintiff for keeping a bawdy-house*, upon which indictment he (the plaintiff) was arraigned and tried &c. *et inde legitimo modo acquittatus* (viz.) on such a day at the sessions held in the Old Bailey &c. which *day of acquittal* was by the plaintiff's own shewing *after Michaelmas Term began*, of which Term the bill was; and Holt Ch. J. cited a case between HUTCHINSON AND THOMAS in the time of Hale Ch. J. where after verdict it appear'd, that the cause of action accrued on a day after the Term began, in which the action was brought, and the bill was of the Term with a general memorandum, as in this case, and it was adjudged, that the bill did relate to the first day of the Term, and therefore that judgment was arrested; and so it was in the principal case; but it has been held good if * *bail was filed after the Term began*. Carth. 114. Pasch. 2 W. & M. B. R. Venables v. Daffe.

2. In making up your issues &c. in the *memorandum*, after the words *in custod' mar' &c.* if the action be *de placito quod*, then say (*de placito debit'*)—if *pro eo videlicet*, then (*de placito transgr' super casum*)—if in ejectment, then (*de placito transgr' & ejectionis firme*)—if in covenant, then (*de placito convention' fract'*)—if in trespass, then (*de placito transgr' &c.*) Reg. Plac. 7, 8. cap. 1.

3. The *entries* of the ordinary proceedings in the *Common Pleas* are not by memorandums, as in the King's Bench and Exchequer; for as the one was designed to determine criminal proceedings, and the other the revenue, so the proceedings in common cases in both Courts, not being the original and principal design of their establishment, these proceedings are the *by-business* of these Courts, and entered by way of memorandums; but in the case of an *action of an attorney*, which is the *by-business* of the Court, the proceedings are entered by a memorandum. G. Hist. C. B. 39. cap. 4.

4. Defendant *demurred*, and shewed for cause, that in the memorandum it is *not said, whether the bill was in a plea of debt or case, or in what plea*. It was argued for the plaintiff, that the bill is set out in *hæc verba*, and shews itself; judgment for plaintiff. Barns's Notes in C. B. 233. Trin. 7 & 8 Geo. 2. Adkin v. Worthington.

5. Plaintiff declared upon a memorandum upon a bill, but omitted in the memorandum the words (*in a plea of trespass upon the*

the case) defendant demurred, and shewed this omission specially for cause; per Cur. the plea appears by the bill, which is set forth verbatim in the declaration; judgment for plaintiff. Barns's Notes in C. B. 235. Trin. 7 & 8 Geo. 2. Adkin v. Worthington.

6. Defendant moved that plaintiff might insert the true day of filing the bill (viz. February 3d last) in the memorandum at the head of his declaration, and that defendant might have leave to plead a tender of last Term, the declaration not having been delivered till after the Term. The rule to shew cause was made absolute on hearing council on both sides. Barns's Notes in C. B. 253. Easter 12 Geo. 2. Potts v. Creswell.

Menace.

(A) Menace. *What shall be said a Menace sufficient to avoid Things.* See Durefs, (B).

[1.] If a man does a thing upon a menace *for doubt of death*, he shall avoid it, tho' no act or force be used against him. 43 E. 3. 19.]

[2. Menace to kill a man if he will not make a deed is sufficient to avoid it. 13 H. 4. Title Durefs, 20. 39 E. 28. b. though there be not any act to constrain him to it.]

[3. If a man makes a deed upon menace of battery to avoid greater evil, this shall avoid the deed. 4 H. 4. 2. Contra 13 H. 4. Durefs 20. Menace of corporal pain shall avoid a deed; otherwise it is of goods. Fin. Law. 8. b.

[4. If a man menace another *that if he will not enter into a bond of 100l. to him he will eject him* out of the house in which he dwells; upon which, to avoid the ejectment out of his house, he enters into the obligation; this menace is not sufficient to avoid this obligation; because it is *not made to his life or member, but only to his estate*. Mich. 15 Ja. in the Star-Chamber, between Goodrick and the Lord Clifton. Resolved by the Judges, the Lord Cook, the Lord Keeper, and Court; and it was said, that an action being brought upon this bond, the defendant pleaded per minas, and yet it was found and adjudged against him.]

In debt upon an obligation, the defendant said, that A. and B. took his

Fol. 125.

beasts and chased them to D. and the defendant demanded his beasts, plaintiff

and they refused to deliver them, and said, that if the defendant did not make obligation to the

plaintiff that they would beat and maim him if he took his beasts, by force of which menace he made obligation, judgment si actio; and by three of the Justices, and by the best opinion, this is no plea; for it shall not be avoided but by menace of his body, and not by menace of his goods. Br. Dorch, pl. 16. cites 7 E. 4. 21. † Orig. (Un.)

Contra of imprisonment made to my father, mother, feme,

5. Menace of imprisonment is as good cause to avoid a deed or obligation, as menace of life and member; by the opinion of the Justices except Prisot. Br. Durefs, pl. 9. cites 39 H. 6. 50. or brother, I shall not avoid a deed by this. Ibid.—And menace to burn or break a house is no cause to avoid a deed. Ibid.

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(B) By whom, being made by a Stranger.

If a stranger menace J. W. to make to me an ob-

[1.] IF a stranger menace by covin of him who is to have the benefit to make a deed, it is avoidable. 43 E. 3. 19.]

obligation, and he makes it by the menace; there J. W. shall avoid it by the menace of the stranger, as well as if the obligee himself had made the menace; quod nota; a good case, and agreed by all the Justices except Prisot. Br. Durefs, pl. 1. cites 39 H. 6. 50.

2. Debt by W. C. the defendant said, that the plaintiff by A. B. and others unknown, by covin of him the plaintiff, him the defendant at N. in the county of N. menaced that he would take and imprison him wheresoever he could find him, unless he should pay 10l. to the same plaintiff, or make to him an obligation of 10l. by which the defendant, fearing of the threats and imprisonment aforesaid, made and delivered the aforesaid writing to the same plaintiff, of which he prayed judgment &c. And the plaintiff demurred, and the defendant alio; and the opinion of the Court was against the plaintiff; by which he was nonsuited, and brought a new action. Br. Durefs, pl. 1. cites 28 H. 6. 8.

(C) Punishable.

1. IF one menace an attorney for prosecuting him in the King's Court in a suit there, he shall be fined and imprisoned by the Court where the party is attorney; per Doderidge J. Lat. 220.
2. 9 Geo. 1. cap. 22. s. 1. enacts, That if any person shall knowingly send any letter without a name subscribed, or signed with a fictitious name, demanding money, venison, or other valuable thing &c. or if any person shall by gift or promise of reward, procure any other to join him in any such unlawful act, every person so offending, being convicted, shall be guilty of felony, and shall suffer death without benefit of clergy.

(D) Just-

(D) *Justifiable*, in what Cases and how far.

1. **T**Respafs. Where the *father dies seised*, and *J. N. abates*, the *son cannot justify menace made to the abator without alleging, that he entered upon him*; but if he enters, and the abator continues possession, there he may menace him, that he shall repent as the law wills (for without entry he cannot punish him for the trespass), *absque hoc, that he menaced him of life and of member*. Br. Trespafs, pl. 158. cites 22 H. 6. 48.

2. *Debt upon an obligation*, the defendant said, that it was made by menace of the plaintiff to imprison him; the plaintiff said, that he said to the defendant, that he would sue him for 10l. debt, which he owed him, and for which the obligation was made, and imprison him, if he could, if he would not pay him &c. which is the same menace &c. and the opinion of the Court was, that it is no plea; for the one is a lawful menace, and the other is a tortious menace. Br. Durefs, pl. 23. cites 16 E. 4. 7.

(E) Of what Persons; and *Pleadings*, and Pro- [359]
ceedings.

1. **I**N præcipe quod reddat, if the *tenant pleads the release of the demandant*, and the demandant says, that it was made at *A. by menace*, the other shall say that he made it of his good will, and not by menace. Br. Traverse, per &c. pl. 365. cites 43 E. 3. 19.

2. The Justices of Bank may enquire of *menace and imprisonment of an attorney in the King's palace* by inquest of officers of the palace, and process upon it shall be by *capias and exigent*. Br. Process, pl. 178. cites 32 H. 6. 34.

3. Process was made to the *Warden of the Fleet* of menace and imprisonment in the inferior palace of Westminster. Br. Process, pl. 180. cites 32 H. 6. 34.

4. In debt upon an obligation the defendant said, that the plaintiff *menac'd him at B. by which he made the obligation at L.* and the plaintiff said, that he *menac'd him at B. but he after made the obligation at L. at large, and not by the menace*, and the defendant said, that he did it by the menace, *Prist*; and the others *e contra*; and it was doubted where the *visne* shall come. Br. Dette, pl. 25. cites 33 H. 6. 24.

5. *Debt upon an obligation against a prior under the covent seal*; he said that the prior his predecessor carry'd 5 chanons, who were all the covent, to D. and there *menac'd them to make the obligation, by which menace they made the said obligation*, and it was held there, that a covent or commonalty may do an act by menace. Br. Durefs, pl. 2. cites 35 H. 6. 17.

said, that before the making of the deed, and at the time of the making thereof &c. the said J. then abbot menac'd A. B. C. and D. the monks who were then the covent, that is to say, 7 in all, to

In replevin, the defendant avow'd for rent-charge granted by abbot and covent of D. the plaintiff

imprison them and detain them in prison till they sealed the deed, by force of which they made the deed, and it is held there prima facie, that covenant nor commonalty can neither be imprison'd, nor menac'd to be imprison'd generally, nor by general pleading, but they may be menac'd, as by special pleading above, that is to say A. B. C. and D. who made the covenant. But per Moile, he saith that those and no more made the covenant &c. Br. Durefs, pl. 9. cites 39 H. 6. 50.

6. It is no plea, that the *mayor and his commonalty* made the deed by menace. Br. Durefs, pl. 18. cites 21 E. 4. 8. 14 & 15.

[For more of Menace in general, see Durefs, Trespass, and other proper Titles.]

Merchants.

(A) What Regard the Law pays them, and their Usages.

* The custom of merchants is part of the common law of this kingdom, of which the Judgesought to take notice; and if any doubt
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arise about the custom, they may send for merchants to know the custom; per Hobart Ch. J. Winch. 24 Van-Heath v. Turner.—
We take no-

1. **M**erchandise is so universal and extensive, that it is in a manner impossible, that the municipal laws of any one realm should be sufficient for the ordering of affairs and traffick relating to merchants. The law concerning merchants, is called the *Law Merchant* from its *universal concern, whereof all nations do take special knowledge*, and the * *common and statute laws of England take notice* of the law merchant, and leave the causes of merchants in many instances to their own peculiar law. As in the 13 Ed. 4. 9, 10. A *merchant-stranger made suit before the King's Privy Council* for certain bales of silk feloniously taken from him, wherein it was moved, that this matter should be determined at common law; but the Lord Chancellor answered, that this suit is brought by a merchant, who is *not bound to sue according to the law of the land, nor to tarry the trial of 12 men*. And it was there likewise resolved by all the Justices, that if the *merchandizes* of such a *merchant stranger* be *stolen* and waived by a felon, the *King himself shall not have them as waifs*; otherwise of the goods of a common person. 3 Molloy 458, 459. cap. 7. f. 15. cites 27 E. 3. cap. 20.

We take notice of the laws of merchants that are general, not of those that are particular usages; per Holt Ch. J. 2 Salk. 443. Lethulier's Case.—That cannot be a law or custom among merchants, which is grounded on a fraud. N. Ch. R. 88. Borne v. Vande.

2. In *war*, merchants in an enemies country are *privileged from any violence* to be offered them. 3 Molloy 459. cap. 7. f. 15. cites Grot. de Jure Belli et Pacis, lib. 2. cap. 11. f. 12.

3. There are likewise (for the accommodation of commerce and traffick) in all countries *privileged ships and boats* serving the country or the prince, which have great prerogatives of being free of imposts and customs, and not subject to arrests. And all ships are subject to this service upon command, and if they refuse, the ships are forfeited by the law maritime. 3 Molloy 459. cap. 7. f. 15. cites Lex Mercat. 110, 111.

4. If a *merchant* commit any offence, for which he is to be amerced, this *amercement shall be salva merchandiza sua*; because trade and traffick is the livelyhood of a merchant, and the life of the common-wealth, wherein the King and every subject hath an interest. 3 Molloy 459. cap. 7. f. 15. cites Magna Ch. cap. 14. 2 Inst. 28.

5. By the statute of the 5 H. 4. cap. 7. *merchants alien shall be used in this realm as denizens be in others*. 3 Molloy 459. cap. 7. f. 15.

6. A man delivered kerkies to be sold in Spain; the factor sells to one who becomes a bankrupt; and it is a *law in Spain, that if the factor enter it before a register, and had a testimonial, that he shall be discharged*. And the Court said, we will judge here that he shall be discharged. 3 Molloy 459, 460. cap. 7. f. 15. cites 2 Roll. Rep. 497. Caps v. Tucker.

7. *Debt upon a bill by a merchant to pay foreign coin* amounting to 300 l. to be paid *upon the payment of the Feast of the Purification called Candlemas Day*. Upon non est factum pleaded, and verdict for the plaintiff, it was moved in arrest of judgment, that the declaration was not good, because payment of Candlemas is not known in our law; yet the judgment was affirmed; for that *amongst merchants such payment is known to be on the 20th of February*, and it appears that the defendant was a merchant, and the Judges ought to take notice of it, being used among merchants for the maintenance of traffick. Trin. 6 Jac. B. R. Yelv. 135. Pierson v. Pountey.

Brownl.
102. S. C.
seems a
translation
of Yelv.

8. *All other subjects* are *restrained to depart the realm, to live out of the realm*, and out of the King's obedience, if the King so thinks fit; *but merchants* are not, for they may depart, and the same is no contempt, they *being excepted out of the statute of 5 R. 2. cap. 2.* and by the common law they might pass the seas without licence, tho' not to merchandize. 3 Molloy 460. cap. 7. f. 16.

9. Merchants by law-merchant *may assign debts*, but otherwise of actors and transactors in England. Arg. 2 Chan. Cases 37. in Case of Fashion v. Atwood.—But it was decreed that debts assigned by parol by the clothier to the factor as a security for what the factor had overpaid should go to the executors or creditors of the factor deceased, and not to the bond creditors of the clothier. 2 Chan. Cases 38. Trin. 32 Car. 2. Fashion v. Atwood.

(B) *Who* are said to be Merchants.

1. **E**VERY one that buys and sells, is not from thence to be denominated a merchant, but *only he who trafficks in the way of commerce by importation or exportation; or otherwise in the way of emption, vendition, barter, permutation, or exchange, and which makes it his living to buy and sell, and that by a continued assiduity, or frequent negotiation in the mystery of merchandizing; but those that buy goods to reduce them by their own art or industry into other forms than formerly they were of, are properly called artificers, not merchants; not but merchants may, and do alter commodities after they have bought them, for the more expedite sale of them, but that renders them not artificers, but the same is part of the mystery of merchants; but persons buying commodities, tho' they alter not the form, yet if they are such as sell the same at future days of payment for greater price than they cost them, they are not properly called merchants, but are usurers, tho' they obtain several other names, as ware-house keepers, and the like; but bankers, and such as deal by exchange are properly called merchants.* 3 Molloy 456, 457. cap. 7. s. 13.

2. If a *person*, who otherwise is no merchant, being beyond sea *takes up money and draws a bill* upon a merchant, he cannot in an action brought upon this bill against him as the drawer thereof plead that he was no merchant; for the very taking up the money and drawing the bill makes him a merchant to this purpose, and is a merchandizable act. Comb. 152. Mich. 1 W. & M. at Serjeant's Inn in Fleet-street. Sarsfield v. Witherly.

A merchant taylor is nonsense and unintelligible, they knew not what it meant; so the Court seemed to think. 2 Salk. 611. Trin. 4 Annæ. B. R. Queen v. Harper.

3. *Merchant includes* all sorts of traders as well and as properly as merchant adventurers, cites Spelm. Guilda D. 279. b. A merchant taylor is a common term; per Holt Ch. J. 2 Salk. 445. Mayor &c. of London v. Wilks.

2 Salk. 611. Trin. 4 Annæ. B. R. Queen v. Harper.

[For more of Merchants, see Bills of Exchange, Factor, Partners, and other proper Titles.]

Merger.

(A) In what Cases there may be a Merger.

1. **E**STATE at common law cannot merge in an estate by custom. And. 191. Mich. 27 & 28 Eliz. Smith v. Lane.
2. Franktenement cannot drown in a chattel. 10 Rep. 48. b. Mich. 10 Jac. Lampet's Case.
3. No merger can be where estates differ only in quality and not in quantity. Arg. Roll. R. 178. Pasch. 13 Jac. B. R. in Case of Bowles v. Berrie. Raym. 413. —As a tenancy after possibility of issue extinct, and a tenancy for life. Roll. R. 178. Pasch. 13 Jac. B. R. in Case of Bowles v. Berrie.
4. An interest will not drown in an authority; as lessee of a manor, except waifs, estrays, perquisites of Courts &c. and (a lease being afterwards of all those) the lessee of the manor is made bailiff; it was adjudged to be no surrender. Arg. Hard. 47. Hill. 1655. cites the Case of Gibbs v. Seale. [362] Cro. J. 176. Gibson v. Searl.
5. There is no rule or case that there shall be a merger, where the estates may stand; and the taking it so is only to preserve the intention of the parties. Arg. Raym. 37. Mich. 13 Car. 2. B. R. in Case of Stevens v. Brittredege. Mergers are odious in equity, and never allowed unless for special reasons. Wms's Rep. 41. Pasch. 1701. in Case of Philips v. Philips.—Sec Devise. S. C. 3 Lev. 407. Mich. 6 W. & M. C. B. Godbolt v. Freeston.—
6. Where there is an intermediate estate, there can be no merger. Arg. Cumb. 81. Hill. 4 Jac. 2. B. R. in Case of Deighton v. Greenville. Ibid. 437. Hill. 7 W. 3. C. B. Duncomb v. Duncomb.—Raym. 36. Mich. 13 Car. 2. B. R. Stevens v. Brittredege.
7. Equal things cannot drown one another.

(A. 2) In what Cases, where the Estates are in different Rights and Respects.

1. **I**F lessee for years makes lessor executor the term is not drowned; because he has the freehold in his own right and the term en auter droit. Co. Litt. 338. b. And if the lessor dies the term is revived.—Arg. 3 l.e. 111. says it was so holden by some. —Br. Extinguishment 54. that the term is extinct, tho' it remains affects.—Cited Arg. 2 Roll. R. 472. Mich. 22 Jac. B. R. in Case of Litchden v. Windmore and Tucker.

Lessee for years re- 2. *Estate for years and a freehold may consist with a several*
mainder for *respect*; per Tirrel J. Arg. Cart. 62. cites 1 Inst. 338.
years; if

the first takes estate for life, his estate for years is not so determined, but that the remainder stands.
Brownl. 181. Trin. 9 Jac. Bicknall v. Tucker.—So if A. has a term in right of his wife, or as
executor and purchases the reversion, it is no extinguishment, because he has the term and reversion
in different rights; per Holt Ch. J. 1 Salk. 326. Hill. 11 W. 3. B. R. in Case of Gage or Grey
v. Acton.—Cro. J. 275. Platt v. Sleap.—See Bridgm. 29. Crocker v. Kelsey.—Cro. J. 631.
Trin. 21 Jac. S. C.

S. P. 1 Le. 3. It was said at the Bar, if a parson patron and ordinary
334 Arg. makes a lease for years of the glebe land of the parsonage, and after
Trin. 33 the parson dies, and the lessee for years is made parson, and after
Eliz. B. R. he dies, that his executors shall not have the residue of the said
cites S. C. term which is to come; because the term was extinct by the
—S. C. cited franktenement of the land, which the parson had in him; the
3 Le. 111. Trin. 26 which Catline Ch. J. denied, for he said that he had the term in
Eliz. contra, his own right, and in the capacity of his natural body, and the
that the inheritance as parson, which is in another capacity, and there-
term is ex- fore the term shall not be extinguished; but some at the Bar said,
tingent, altho' that he had both in his own right, and to his own use; and there-
he had the fore they said; that it is reason that it should be extinguished
term in his notwithstanding that he had it in several capacities; and it is not
own right, like where the termor has the term of years as executor of the
and the free- lessee; for there if he dies the term shall be revived. Pl. C. 419.
hold in the b. 420. a. Trin. 14 Eliz. in Case of Bracebridge v. Cook.
right of the church.—
S. C. cited
1 Roll. R.
247. Trin.

12 Jac. that by the best opinion it is an extinguishment, and that so it was taken in Sir Francis
Fleming's Case.—Lane 101. Hill. 8 Jac. contra, that it does not extinguish his term; per Brom-
ley J.—But see Winch. 120. contra, that it was a surrender, cites Rudd's Case.—So is Hutt.
105. in S. C. als. Sir A. Capel's Case.—So Jenk. 200. in pl. 18. that the lease is extinct.—So of a
master of an hospital. Ibid.—But if a lease for years be made to A. one of the Commonalty of Lon-
don, and afterwards he becomes Mayor, this lease is not extinct; and so of a Dean and Chapter. Ibid.

[363] 4. The lessor enfeoffed the lessee to the use of others; in this case, if
S. C. cited the statute of 27 H. 8. cap. 10. of uses had never been made, the
7 Rep. 38. term had been merged at common law. But Trin. 27 Eliz. it
—2 Le. 178. was resolved that the term was saved. 7 Rep. 20. a. cites it as
cites it so adjudged in Cheyney's Case.
adjudged in Case of Che-

ney v. Oxenbridge —2 And. 192. S. C. adjudged.—cited Arg. Winch. 109.—S. C. adjudged
Mo. 196.—So a feoffment of rent to the grantee and others to the use of grantor. And. 87. Monk's
Case.—And. 233. Bate v. Villers.—A. seised of land leased the same to B. for 99 years, and
2 years after by lease and release conveyed the inheritance to B. and to another to the use of A. and
the heirs of his body, with diverse remainders over; and if by this conveyance the lease for 99 years
was destroyed in all or in part, was the question? It was argued, but adjournatur. Vid. 2 Lev. 126,
127. Hill. 26 & 27 Car. 2. B. R. How v. Stile.

* 2 Roll. 5. So of bargain and sale to lessee to make him tenant to the præcipe
245. S. C. for suffering a common recovery to the use of the lessor and his
—Because it heirs. Cro. J. 643. Mich. 2 Jac. B. R. * Ferrers and Curson
was in him v. Fermor.
for another
purpose; per
tot. Car. Mo. 107. Pasch. 26 Car. 2. B. R. Fountain v. Cook.

6. *Livery by lessee for years as attorney to the lessor is no extinguishment of the term.* Mo. 280. Mich. 31 & 32 Eliz. C. B. *Batty v. Trevillian.*

But where A. was lessee for years, remainder to B. in tail,

remainder over, and lessee enfeoffed J. S. and made a letter of attorney to W. R. to enter into the lands, and seal the feoffment and deliver it in his name to the use of B. and his heirs, and B. made letter of attorney to C. to enter in his name, who entered accordingly, this was held a good feoffment, tho' both the lessee and attorney were disseisors; for it is good between the feoffor and feoffee; for the remainder-man by the feoffment and entry is remitted, and the term gone, the freehold having come to it. Gouldsb. 92. Trin. 30 Eliz. Mounson v. West.

7. A man has the *custody* of a house, and afterwards he becomes the *owner* of the house; his custody therein ceases. Arg. Godb. 419.

But if lessee of a house afterwards * accepts a grant of the

custody of the same house, 'tis no surrender. Arg. Hill. 1655. Hard. 47. cites the Case of Gibbs v. Seales.

* Contra; for the custody of the same thing which was let before is another interest in the same thing leased, and cannot stand with the first lease. Cro. J. 177. Trin. 5 Jac. in Case of Gibson v. Searl.—S. C. cited D. 200. in marg. as adjudged that it was a surrender.—Per 4 J. against 2. that 'tis a surrender. D. 200. marg. E. of Arundel v. Ld. Gray.

(B) In what Cases there shall be a Merger.

1. IF one has a *portion of tithes*, and afterwards he *purchases the rectory*, out of which &c. the portion of tithes is not extinct but remains grantable. Agreed by counsel of both sides; and Haughton J. gives this reason for it, because the portion of tithes may be more ancient than the rectory, and that the rector anciently had no title to the tithes; for before the council of Lateran, every one paid his tithes to what parson he would. 2 Roll. R. 161. Pasch. 18 Jac. B. R. in Sir Edward Cook's Case.

2. A. was *seised in fee of a manor*, out of which a *fee-farm-rent* was *issuing*, and purchas'd in the rent, and took the conveyance to himself in fee. By this the rent is merged in the inheritance. 10 Mod. 525, 526. Mich. 10 Geo. in Canc. Atcherley v. Vernon.

(C) Of what Estates. Copyholds.

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1. WHERE the lord enfeoffs his copyholder to the use of others, the copyhold estate is saved by the 27 H. 8. 7 Rep. 38. Mich. 5 Jac. in LILLINGTON's Case says, it was so resolved 28 Eliz. in the Court of Wards in one Ifed's Case.

2. If a copyholder in fee takes assignment of a lease made to J. S. yet the copyhold is drown'd. 2 Rep. 17. Mich. 28 & 29 Eliz. C. B. Lane's Case.

And. 191. Smith v. Lane.—S. P. But if he takes a lease for years of the manor, it is but a suspension of his copyhold during the term. Arg. Cro. J. 84. Mich. 3 Jac. B. R. says it has been so adjudged.

3. The custom of a copyhold manor was, that if a copyholder for life died seised having a wife at the time of his death, that she should

should have her widowhood in it; a copyholder purchases the fee in the name of A. who conveys it to B for life, the remainder to the copyholder in fee; afterwards the copyholder takes wife, and grants this remainder to C. in fee, and dies; this wife shall have the widowhood in this land; for the copyhold was not destroyed nor extinguished, by reason of the estate for life of B. which hindered the destruction of the copyhold. Although the copyhold be destroyed by the said feoffment of it, as to the lord in this case; yet it is not, as to the copyholder. By the two Ch. J. and Ch. Baron. Jenk. 318. pl. 15. cites 18 Jac. Cro. 573. Waldoe's Case.

4. Lord of a manor, having by the custom the cut of the woods growing on the lands, grants all the woods and underwoods growing, and to grow on the copyhold to the copyholder and his heirs. This shall not merge in the copyhold. Vern. 21. Mich. 1681. Faulkner v. Faulkner.

5. Copyholder in tail takes a conveyance of the freehold in fee; Lord Chancellor seem'd to make little doubt, but that the copyhold was merged. Vern. 458. Pasch. 1687. Parker v. Turner. *Ibid.* 393. Hill. 1685. S. C. — S. P. That there is no title remaining by virtue of the copyhold intail'd, and judgment accordingly. Cart. 121. Pasch. 17 Car. 2. C. B. Taylor v. Shaw.

6. If a copyholder for life surrender, that is drown'd, and the new estate comes out of the estate of the lord; but if in fee it is otherwise. Arg. Show. 285. Mich. 3 W. & M. in Case of Glover v. Cope.

(D) Of what Estates. Fee Simple.

1. TWO fee-simples that may stand in several persons distinct, when they meet in one person, cannot do so, but the greater and absolute fee doth swallow up the base and limited fee. Hob. 323. Pasch. 17 Jac. in Case of Elvis v. Archbishop of York, cites Hussy's Case. S. P. Carth. 258. Simmonds v. Cudmore — 1 Salk. 338. S. C.

(E) Of what Estates. Fee Tail.

1. THE statute of Westminster 2. having made estates tail a kind of particular estates, they must (the protection of the statute being gone by the fine) like all other such estates be subject to merger and extinguishment when united with the absolute fee. 1 Salk. 338. Hill. 5 W. & M. Simmonds v. Cudmore. Carth. 258. Simmonds v. Cudmore — An estate [365] tail cannot be merged or surrendered or extinct by accession of greater estates. 2 Rep. 61. Br. Parliament, 73. Hill. 41 Eliz. C. B. in Wiscott's Case. — 8 Rep. 74. b. Trin. 7 Jac. in Ld. Stafford's Case. — If lands are given in fee to one, who was tenant in tail, his issue shall not be remitted, because the later act takes away the force of the statute de donis. Arg. Show. 420. cites 1 Rep. 48. 2 Rep. 46. — Where a man has title to land by a tail, and after the same land is given to him by parliament, his heir shall not be remitted; for by the act of parliament all other titles are excluded for ever; for it is a judgment of the parliament that this gift only shall stand. Per Englefield J. Br. Parliament, pl. 72. cites 29 H. 8. in Case of Button v. Savage. — So where the King has title in tail, and the land is given

given to him by parliament in fee, the tail is determined, so that the heir shall not avoid leases nor charges &c. made by his father; for the last statute binds all former titles and estates not excepted. Ibid.

2. Tenant in tail, *remainder to the King*; tenant in tail makes a lease for years, and is *attainted*, the King shall avoid the lease; for the *estate tail* is as much gone by merger as if tenant in tail was dead without issue. 1 Salk. 338. Hill. 5 W. & M. *Simonds v. Cudmore*.

(F) Of what Estates. Estate for Life.

1. LAND devisable is given to the baron and feme in tail, the remainder to the heirs of the baron, and after the baron devised the reversion to his feme, and died without issue, and therefore she was adjudged to be seised in fee; for the fee came to the naked franktenement by the devise and death of the baron without issue. Br. Estates, pl. 60. cites 27 Aff. 60.

2. Where land is given in special tail to the baron and first wife, the remainder to the baron in tail, and the first wife dies without issue, the baron is seised by the second tail in remainder, because the franktenement for life merged in the remainder. Br. Estates, pl. 9. cites 50 E. 3. 4.

3. Land is given to W. and A. his feme in special tail, the remainder to B. in tail, the remainder to the right heirs of B. The baron dies without issue, and A. the feme survives, and is tenant in tail after possibility of issue extinct, and takes another baron and has issue, and after B. dies without issue, to whom A. the feme is heir, and after A. dies. The 2d baron shall be tenant by the curtesy; for when the remainder in fee came to the feme tenant in tail after possibility of issue, the franktenement was merged in the fee, and so A. was seised in fee. Br. Estates, pl. 25. cites 9 E. 4. 17. 18.

the inheritance? Brown held that it should, but Dyer e contra. Mo. 18. Mich. 2 Eliz. Anon.

Br. Quod si deforcat, pl. 11. cites S. C. per Middleton remainder to baron and feme in special tail, remainder to the heirs of baron; the feme dies. Quere if the estate of tenant in tail after possibility is drowned in

4. One cannot have an estate for his own life and the life of another at the same time in present interest; for the greater will drown the lesser; but if the greater be in presenti, and the lesser in futuro, as a * lease to A. for his own life, remainder to him for life of B. it is otherwise. Godb. 51. Mich. 28 & 29 Eliz. B. R. Arg. in Case of Windsmore v. Hulbert.

For an estate for his own life is greater than an estate for another's life, and shall drown the estate

for another's life. Godb. 51, 52. Mich. 28 & 29 Eliz. B. R. Arg. in Case of Windsmore v. Hulbert. — Arg. 2 Roll. R. 445. S. C. cited and said the opinion of the Court was that the remainder was void. — D. 10. — 11 Rep. 83. b. — 2 Rep. 60. b. 61. Wiscot's Case. — So it is by grant, but not by way of limitation. Per Doderidge J. 2 Roll. R. 445. Trin. 21 Jac. B. R. cites Lascel's Case. — S. P. per Fleming Ch. J. Bulst. 137. Bowles v. Poor. — * Per Gawdy J. Goldsb. 158. in Case of Rolle v. Ardwick. — But if I make to one a lease for his own life and 100 years, both to begin at the same time, the lease for years is drowned. Godb. 51, 52. Arg. in Case of Windsmore v. Hulbert.

5. Lease to A. for the life of B. without impeachment of waste, the remainder to A. for his own life. He is now punishable for waste;

waste; for the first estate is surrendered. Arg. Godb. 52. Mich. 28 & 29 Eliz. B. R. in Case of Windsmore v. Hulbord.

Le. 174.
S. C.

6. *A. tenant for life, remainder to B. in fee of a copyhold; B. makes a lease by parol, tenant for life and B. join in a surrender to the use to B. This is a good lease against B. and by the surrender of A. to the use of B. his estate is merged in the fee, and as it were extinct, and cannot hinder the lease to have operation; and is all one as if he were dead, and being all in one hand, cannot have any privilege severed from the inheritance; as if he in remainder grants a rent-charge, and after the tenant for life surrenders, the rent shall commence presently.* Cro. E. 160. Mich. 31 & 32 Eliz. B. R. Dove v. Willet.

Cited Roll.
R. 178.—

It is a good
limitation,
and he has
estate for all

7. *Habend' to A. during his life, and the lives of B. and C. It is but one franktenement, and can be no merging; it is a frank-tenement for three lives.* 5 Rep. 13. Mich. 41 & 42 Eliz. Roffe's Case.

Cro. E. 182. Utty Dale's Case.—It is good for the three lives; and all leases by bishops and tenants in tail are so, and if granted by way of remainder are not good. Cro. E. 491. Roos v. Atwood.—Goldsb. 187. Roffe v. Ardwick.—Mo 398. Roos v. Audwick.—So it was to A. and his heirs during his life, and the life of B. and C. the limitations are good enough, and the heir shall have this rent as a party specially named, and as heir by descent, though it be not properly an estate descendable. Cro. J. 282. Trin. 9 Jac. B. R. Bowles v. Poor.

8. *Lease for life, remainder for life or in tail, on condition that if lessee does such act, he shall have fee.* By performance of the condition he shall have estate in fee, and yet this shall not drown the estate for life. 8 Rep. 76. Trin. 7 Jac. in Ld. Stafford's Case.

Buls. 61.
S. C.

9. J. S. seised of land in three parishes in fee has three sons A. B. and C. and devised land in one parish to A. in another to B. and in another to C. and *if either of them died, the other surviving should be his heir.* Nothing but a freehold passing by the devise, the reversion in fee descending on the eldest had drowned the estate; so that on the death of A. his heir shall have his part, and the remainder vests not in B. and C. Cro. J. 260. Mich. 8 Jac. B. R. Wood v. Ingersale.

Roll. R.
178. S. C.

10. *Covenant to stand seised to the use of himself and wife for their lives, without impeachment of waste, and after their decease to the use of first son &c. in tail, remainder to his own right heirs.* Resolved, that the covenantor and his wife were seised of an estate tail executed sub modo, i. e. till the birth of the first son, and then by operation of law the estates are divided, i. e. covenantor and wife become tenants for their lives, remainder to the issue male in tail, remainder over; for the estate for their lives is *not absolutely drowned*, but with this implied limitation, till they have issue male. 11 Rep. 80. Pasch. 13 Jac. Lewis Bowles's Case.

11. *Lease for life to A. remainder for life to B.—B. grants his estate to A. This is an extinguishment, and the first lessee is immediate tenant to the lessor; per Doderidge J. and agreed by Ley Ch. J. 2 Roll. R. 485. Mich. 22 Jac. B. R. Hard v. Foy.*

12. *Devise to A. (being the heir at law) for life, and if he die without issue living at his death, then to B. another son, and his heirs; but if A. has issue living at his death, then the fee shall remain to the right heirs of A. for ever. A. suffers a common recovery, and dies without issue. Resolved, that the estate for life devised to A. shall not merge in the reversion descended to him, contrary to the express words and intent of the will; but shall leave an opening as they call it, for the interposition of the remainders, when they shall happen to, interpose between the estate for life and the fee. Adjudged a contingent remainder, and barred by the recovery. Raym. 28. Mich. 13 Car. 2. B. R. Plunket v. Holmes.*

Sid. 17. S.C. 1 Lev. 11. S. C.— 3 Lev. 407. S. C. cited in Case of Godbold v. Freestone. —A. had issue three sons, B. C. and D. and devised land for 30 years to C. to perform his will, and

pay his debts, and made C. executor, and if C. dies within the 30 years, then D shall have what shall remain of the 30 years, and died. B. died without issue, and the inheritance descends on C. and afterwards C. died and left W. R. his son and heir; but held that D. should have the residue of the 30 years; for tho' the term was extinct in C. yet it is a new devise to D. the words being that he shall have such term &c. Cro. E. 128. Hill. 31 Eliz. B. R. Lowe v. Lowe.—3 Le. 110. Trin. 26 Eliz. in the Exchequer. Vincent Lee's Case. S. C.

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13. If lands are given to A. for life, remainder to A. and B. in fee, it is not any merger because it is one conveyance. Arg. Raym. 36. Mich. 13 Car. 2. B. R. cites 2 Rep. 60. Wiscot's Case.

14. If a particular estate is limited to A. and B. and a remainder is limited adequate to them to drown, (as) to them for their lives, the remainder to their heirs; the estates for life shall be consolidated. Arg. Raym. 36. Mich. 13 Car. 2. B. R. cites Lewis Bowles's Case.

But when there is a particular estate for life to two, and the remainder is

not answerable to them; as to three for life, remainder to two in fee, they are distinct estates. Ibid. 37. Arg.

15. Feme covert tenant for life, remainder to her first son; she and her baron accept a fine of the fee; afterwards a son is born, and the feme dies. The remainder is destroyed, and the estate of the wife merged; tho' had she survived her baron she might have waved the fee and revived the estate for life. 2 Lev. 39. Hill. 23 & 24 Car. 2. B. R. Purefoy v. Rogers.

16. Estate to A. for life, remainder to B. and his heirs for the life of A. remainder to the heirs of the body of A. and remainder over; the wife of A. shall not be endowed; for the estate for life of A. does not merge. 3 Lev. 437. Hill. 7 W. 3. C. B. Duncomb v. Duncomb.

(G) Of what Estates. Terms for Years.

1. **L**EASE to A. for 10 years to begin now; lease to B. for 10 years to begin at Michaelmas; a purchase of the fee simple by first lessee drowns his term. D. 112. pl. 49. Hill. 1 & 2 P. & M. If lessee for years purchases the reversion of part, the lease holds for the residue; per Ventris J. 2 Vent. 327.—Lease in futuro may merge. Brownl. 40. Hopkins v. Radford.—It was admitted that a future interest will not prevent a merger. 2 Wm's Rep. 237. Trin. 1724. Whitchurch v. Whitchurch.

S. P. per
Periam J.
Golds. 92.
pl. 5.

Dal. 51.
pl. 25.

Metley 36.
Godb. 2.
Pasch. 17
Eliz. C. B.
Anon. S. P.
but Dyer

thought they were tenants in common of the fee——* Pl. C. 418. b. Bracebridge v. Cook.——
Cro. J. 275.—*Baron is termor, and the wife purchases the fee; or if the wife has the reversion be-
fore marriage, this extinguishes the lease, but not if the fee descends to the wife after marriage.*
Jenk. 73. pl. 38. cites Cro. J. 275. Platt v. Sleep.—But quære if they had *bad issue*, so that the
husband would be tenant by the *curtesy*? Ibid.—Buls. 118. S. C.—1 Jenk. 73.

Godb. 2.
S. P. and
seems to be
S. C.—
Arg. Roll.
R. 247.
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2. *Lessor mortgaged his reversion to lessee for years, and paid the money at the day; it was held that the lease for years was utterly extinct.* 3 Le. 6. Mich. 4 Eliz. C. B. Anon.

3. *Feme executrix has a term, and she takes baron, and the baron purchases the reversion; the term is extinct as to the wife, if she survives; but in respect of all strangers, it shall be accounted as assets.* Mo. 54. pl. 157. Pasch. 5 Eliz.

4. *Baron of a termor * purchased the fee; per Manwood, the term is extinct; but if † feme termor marries him in remainder, the term continues; for one is the act of the husband, the other the act of the law.* 4 Le. 38. 6 Eliz. C. B. Anon.

5. *A tenant for life and the administrator of lessee for years of a term in futuro viz. to begin after the death of tenant for life join in the purchase of the fee simple; per Manwood, the term is not extinct, because only an interesse termini; per Mounson, it is not extinct, because he has the term as administrator en autre droit; per Dyer, if executor has a term and purchase the fee simple, the term is determined.* 4 Le. 37. 6 Eliz. C. B. Anon.

6. *Estate for years granted to A. and the wife of the reversioner shall not drown in the reversion of the baron, but upon death of the wife survives to A.* Pl. C. 418. Trin. 14 Eliz. Bracebridge v. Cook.

7. *Lessee for years marries with feme tenant for life; the interest of lessee by the intermarriage is not extinct; for it is but a possibility and not an interest; per tot. Cur. 3 Le. 158. in Case of Cadec v. Oliver.—Cites it as adjudged 17 Eliz.*

Le. 92. S. C.
Mich. 29
& 30 Eliz.
C. B. Ha-
mington v.
Rider.—
Goldsb. 59.
S. C.—Ow.

8. *A. leases for years to B.—B. devises the occupation of &c. to his wife, so long as she shall continue sole, but after she shall marry, to his son. A. enfeoffs the wife, who after took husband; this is no merger, but the son may enter.* And. 162. Rudyard v. Hannington.

67. S. C. by the name of Haverington's Case.

9. *A. leases for years to B. and after makes a lease for years in reversion to C. and afterwards devises the same lands and other lands to C. for life for to bring up A's children. C. entered and took the rent &c. virtute testamenti; it seems this is a merger of the lease.* See Le. 129. Trin. 30 Eliz. B. R. Coleburn v. Mixstones.

10. *Devisor seised in fee devises a term for 21 years to A. and if he die within the term, remainder to B. by descent of inheritance to A. unity of possession, his grant, or his forfeiture, the remainder is defeated; but if the land be devised for 21 years to A. and if he die within the years that B. shall have the residue of the years, no act of A. can prejudice the remainder in B. per tot. Cur. Mo. 269. Mich. 30 & 31 Eliz. in the Exchequer. Lee v. Lee.*

11. He

11. He that has an estate for 10 years may surrender to him that has an estate for 12 years, and the estate is drowned and the other shall come into possession; and a surrender to him that has a greater estate for years is good as to him that has an estate for life; and where the surrender is to a *termor in reversion*, it is all one if the reversioner had a greater estate for years or not. Cro. E. 302. Trin. 35 Eliz. B. R. Hughs v. Robotham.

But if *lessee* for 20 years leases for 10 years, and lessee for 10 years surrenders to lessee for 20 years, this is good to convey his interest, but * not drown the estate, but he has the 20 years as before; otherwise it is of a surrender to another that has the *reversion* for years. Cro. E. 302. Trin. 35 Eliz. B. R. Hughs v. Robotham.—* Ow. 97. in Case of Perr in als. Porey v. Allen.

12. Lessee for 60 years takes a *new lease to begin 10 years after*; it was adjudged to be a surrender presently. Arg. Cro. J. 84. Mich. 3 Jac. B. R. in Case of Gibson v. Searle.—Cites it as * Jesse's Case. 37 Eliz. C. B. Cro. E. 522.

Arg. 3 Le. 244. says it was so held by Doe and Brown J. 2 Eliz. in

Barkins's Case.—* Cro. E. 521. Mich. 38 & 39 Eliz. C. B. Ive v. Samma. S. C.

13. A man may have a *greater and lesser estate* in him at one time, where the *lesser is subsequent*, as an estate for life, remainder for years. Arg. Cro. E. 491. Mich. 38 & 39 Eliz. B. R. in Case of Roos v. Adwick.

14. Devise of land to B. till C. is 21, and then to B. and C. for their lives. If this be a term for years in B. during the minority of C. and a freehold to B. and C. this term cannot stand with the freehold, and therefore is drown'd, and they are immediate jointenants of the freehold; per two Justices; and agreed by Walmley J. that if this shall enure as an immediate devise, then the term shall be extinct, and they are jointenants of the freehold; but perhaps the will did not intend the freehold to take place till after the years expired. Cro. E. 532. Mich. 38 & 39 Eliz. in Scacc. Block v. Pgrave.

15. Lessee for years, remainder for life, remainder in fee. The remainder-man in fee *infeoffs lessee for years*, and makes livery; it was adjudged a good feoffment; because it was not a surrender, [369] by reason of the mean estate for life; per Tanfield Ch. B. Lane 117. cites 41 Eliz. Eades v. Knotsford.

16. The use of land is limited to A. for 99 years, and that J. K. L. M. N. and O. who were feoffees to uses, should be seised to their own use in trust for A. and his heirs, with power to A. to alter and limit the trust as he should think fit. Afterwards A. on his marriage assigns the 99 years term to J. (one of the trustees) and W. R. a stranger, in trust for himself (viz. A.) for life, remainder to his wife for life, remainder to the heirs male of their two bodies, and by the same deed limits the trust of the inheritance in the same manner. A. grants a rent-charge to Sir R. B. and his heirs, with power to enter &c. A. and his wife die, leaving B. their son. The rent being arrear Sir R. B. enters. Then J. and the other trustee assign the term of 99 years to B. who leased to the plaintiff in ejectment. The Jury upon hearing the opinion of the Court found for the plaintiff for all save a sixth part; for so much

was

was drown'd and surrender'd by the assignment of A. to J. one of the six jointenants of the reversion. Vent. 193. Pasch. 24 Car. 2. B. R. Sir Ralph Bovey's Case.

Cro. E. 173. 17. A lesser term cannot merge in a greater. Arg. Show. 306. Hill. 32 Mich. 3 W. & M. B. R. in Case of Leach v. Thompson.

Eliz. B. R. Porry Al-

len.—By taking a second lease for 60 years, a first for 21 years is merged. Cro. E. 237. Pasch. 33 Eliz. B. R. in Case of Wing v. Harris.—3 Le. 242. Mich. 32 Eliz. B. R. S. C.—So if lessee for years takes a new lease for a lesser term, it is a surrender of the first. Arg. Cro. J. 84. Mich. 3 Jac. B. R. in Case of Gibson v. Searle.

(H) Of what Estates. *Trust Terms in Equity.*

1. *REversion in fee fraudulently conveyed* to a termor for 3000 years, and without his consent or privity, on purpose to drown the term, and to hinder the termor's making provision for younger children was decreed not to be merged. Fin. R. 220. Tr. 27 Car. 2. Danby the father v. Danby the son and Pierce.

2. *Lessee for 21000 years assigns the term to the lessor in trust* for his wife and children, and the lessor accepted the trust, and declared it to be for the wife and children &c. The Court supported the trust notwithstanding the merger of the term in the inheritance, and decreed the heir of the lessor to make a further assurance of the remainder of the term to a purchaser of the term from the son of the lessee. Fin. R. 424. Mich. 31 Car. 2. Sanders v. Bournford and Allen & al.

Term of 500 years raised out of an estate in fee, for daughters portions is not merged at law, nor

3. *A portion was limited to be raised out of a term for years for a daughter; the fee after descends on the daughter.* She within age devised the portion. Master of the Rolls relieved against the merger, and decreed the portion to go according to the will of the daughter. 2 Vern. 90. Mich. 1688. Powell v. Morgan.

the trust extinguished in equity by the descent of the inheritance on a daughter, but remains still a subsisting charge on the estate; per Somers C. 2 Vern. R. 354. Hill. 1697. Thomas v. Keynith.

4. *A sum of money was charged upon lands payable to J. S. and vested in trustees in fee till payment, and the same legal estate still continuing in them there can be no merger by an estate tail coming to J. S. who was intitled to the money.* But had this been a meer equitable charge upon the land, and a fee simple had come to J. S. it might then have been a merger. 2 Wms's Rep. 601. 604. Trin. 1731. Duke of Chandos v. Talbot.

[370]

(I) By what Act.

1. *WHERE the inheritance comes to the particular estate, be it by the act of God, the law or the party, the particular estate is drown'd.* 2 Rep. 60. b. Hill. 41 Eliz. C. B. Wiscot's Case.

2. *Term*

2. *Tenant for life, and remainder-man in tail join in a feoffment or fine to a stranger.* The estate for life is merged, and yet the feoffee or conusee shall hold during the life of the tenant for life, tho' the tenant in tail be dead without issue; per Holt Ch. J. Carth. 260. Hill. 4 W. & M. B. R. in Case of Simmonds v. Cudmore.

3. *Tenant in tail, remainder to the King.* Tenant in tail makes a lease for years, and is *attainted*; the King shall avoid the lease; for the *estate tail* is as much gone by merger as if tenant in tail was dead without issue. 1 Salk. 338. Hill. 5 W. & M. Simmonds v. Cudmore.

[For more of Merger in general, see Extinguishment, Portions, Charge, and other proper Titles.]

Mesne.

(A) Mesne. *Against whom.* [Where there are several.]

[1.] If there are several mesnes one after another, if the tenant be *distraigned by the lord paramount*, he shall have this writ against his mesne, and so every one after against his mesne by the special matter till he comes to the mesne next to the lord paramount. 39 H. 6. 31. b. per Curiam. (R. It seems that there ought to be cause of acquittal between every one.) 18 H. 6. 33.]

S. P. Br. Mesne, pl. 14. cites 28 H. 6. 6. — S. P. Till he comes to the chief lord. Br. Mesne,

pl. 22. cites 39 H. 6. 30. But Brook says, it seems that the *first writ of mesne ought to commence by the tertenant*; for none can be distraigned but him, and therefore he may have writ of mesne against his mesne, and the first mesne against the second, and so ut supra. — But it seems that none can have writ of mesne but he who is grieved by suit, unless the tertenant; for he may have writ of mesne, *quia timet distringi*, and so cannot any of the mesnes; for they cannot be distraigned. Ibid. cites 7 H. 4. 12. in the written book.

2. If one be tenant by the curtesy of a mesnalty &c. and the tenant is distraign'd, the writ of mesne shall be sued against him in reversion, and not against tenant by the curtesy. F. N. B. 136. (N).

3. A. seigniorie is granted to baron and feme, and to the heirs of the baron, and in a per quæ servitia the tenant will not attorn, unless they will grant to acquit him &c. whereupon the baron grants or him and his heirs to acquit the tenant and his heirs, and after-

wards the baron dies; the tenant may bring a writ against the husband's heir during the feme's life, who is tenant for life, and good. F. N. B. 136 (O).

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(A. 2) Statute 13 E. 1. cap. 9.

• See (D)—

+ (G)—

+ (C)—

The mischief here first mentioned, before the making of this statute, was, the great delays which were used in the writs of mesne, in which the process at the common law was summons, attachment and distress infinite, and yet the tenant in default of the mesne was presently distrained by the lord paramount, which mischief appeareth by the preamble of this act; for remedy whereof a more speedy proceeding is given by this act in a writ of mesne. Another mischief was, when the mesne had nothing within the same county; for there the tenant was without remedy, and tho' the mesne had sufficient in another county, the common law extended not thereunto, in both which cases remedy is given by this act. 2 Inst. 373.

S. 2. And many have been heretofore sore grieved by such distress, in so much as the mesne (notwithstanding that he hath whereby he may be distrained) doth make long delays before he will come into the Court to answer for his tenant unto the writ of mesne.

S. 3. And further, the case was most hard when the mesne had nothing.

By the common law the lord paramount might have refused his services by the hands of the tenant

S. 4. In case also when the tenant was ready to do his services and customs unto his lord, and the chief lord would refuse to take such services and customs by the hands of any other than of his next tenant, and so such tenants in demean lost some whiles the profits of their lands for a time, and some whiles for their whole time, and hitherto no remedy hath been provided in this case.

peravaile, or by the hands of the tenant for life, where reversion was over, because the mesne or he in reversion was his very tenant in privity, for the which remedy is given by this act. 2 Inst. 374.

S. 5. A remedy is provided and ordained hereafter in this form, that so soon as such tenant in demesne (having a mesne between him and the chief lord) is distrained, incontinent the tenant shall purchase his writ of mesne.

This must be understood of a writ of mesne returnable into the Court of Common Pleas, and not of a writ of mesne that is vicontel, and not returnable. 2 Inst. 374.

S. 6. And if the mesne, having land in the same county, absent himself until the great distress awarded; the plaintiff shall have such day given him in his writ of great distress, afore the coming wherof two counties may be holden, and the sheriff shall be commanded to distrain the mesne by the great distress, like as it is contained in the writ, and nevertheless the sheriff in two full counties shall cause to be proclaimed solemnly, that the mesne do come at a day contained in the writ to answer his tenant.

S. 7. At

S. 7. *At which day, if he come, the plea shall pass between them after the common usage.*

S. 8. *And if he do not come, then such mesne shall lose the services of his tenant, and from henceforth the tenant shall not answer him in any thing, but the same mesne being excluded, he shall answer unto the chief lord for such services and customs, as before he ought to have done to the same mesne.*

If the mesne appears not at the grand distress he shall be fore-judged; that is to say, that the mesne

shall lose the services of his tenant of the tenements before holden. And that the mesne being omitted, the tenant from henceforth shall be attendens and respondens to the chief lord by the same services as the mesne holdeth by. But it is to be observed, that the *immediate chief lord must be named in the fore-judger*; for albeit he be a stranger to the writ, and by his death the writ of mesne shall not abate, yet in the judgment he that is then immediate lord paramount must be particularly named. 2 Inst. 374.

S. 9. *Neither shall the chief lord have power to distrain so long as [372] the aforesaid tenant doth offer him the services and customs due.*

Here three things are

to be observed. 1st. That the tenant *must offer and tender the rent or service due upon the land*, and not be ready only, by reason of the word [offer]. 2dly. This must be done *at the time when the lord comes to distrain*. 3dly. That this act is to be *understood of the services and customs which the tenant may do*, as payment of rents, delivery of heriot-service, or the like; but extendeth *not to personal services annexed to the persons of the mesne*, as homage, fealty &c. for he cannot say, I become your man, nor swear to him fealty &c. But *after fore-judger*, then the *tenant shall do all manner of services which the mesne ought to have done*; for then the mesnalty is extinct; but as long as the mesnalty remains, the personal services remain with the mesne, *servitia personalia sequuntur personam*. 2 Inst. 374.

S. 10. *And if the chief lord exact more than the mesne ought to do, the tenant in such case shall have such exceptions as the mesne should.*

Hereby provision is made for the tenant to

take any advantage that the mesne might do, if the chief lord demand other services than the mesne ought to do, albeit he be a stranger to the avowry. 2 Inst. 374.

S. 11. *And if the mesne have nothing within the King's dominion, the tenant shall nevertheless purchase his writ of mesne to the sheriff of the same shire wherein he is distrained.*

The tenant in such case had no remedy by the common law. 2 Inst. 374.

S. 12. *And if the sheriff return, that he hath nothing whereby he may be summoned, then shall the tenant sue his writ of attachment.*

See (L. 2) pl. 1. 3.

S. 13. *And if the sheriff return, that he hath nothing to be attach'd by, he shall nevertheless sue his writ of great distress, and proclamation shall be made in form aforesaid.*

S. 14. *And if the mesne have no land in the shire where the distress is taken, but hath land in some other shire, then a writ original shall issue to summon the mesne unto the sheriff of the same shire (where the distress is taken), and when it is returned by the sheriff, that he hath nothing in his shire, a writ judicial shall issue to summon the mesne unto the sheriff of the same shire; in which it shall be testified, that he hath land; and suit shall be made in the same shire, until they have passed unto the great distress and proclamation, as above is said, of the mesne having land in the same shire in which the distress is taken.*

S. 15. *And nevertheless suit shall be made in the same shire where he hath nothing, as above is said of the mesne that hath nothing, until the process come to the great distress and proclamation.*

H h 2

S. 16. *And*

This remedy here given of forejudger is a better and speedier remedy than the common law gave. 2 Inst. 375.—* See (N.)

S. 16. *And so after proclamation made in both counties the mesne shall be * fore-judged of his fee and service.*

S. 17. *And where it happeneth sometimes, that the tenant in demesne is enfeoffed to hold by less service than the mesne ought to do unto the chief lord, when after such proclamation the tenant hath attuned unto the chief lord, and the mesne being excluded, the tenant must of necessity answer unto the chief lord for all such services and customs as the mesne was wont to do to him.*

This act speaketh only of the mesne, and not of the mesne and his heirs, and therefore the heirs of the mesne shall not be fore-

S. 18. *And after that the mesne is come into the Court, and hath confessed that he ought to acquit his tenant, or be compelled by judgment to acquit, if after such confession or judgment it is complained, that the mesne doth not acquit his tenant, then shall issue a writ judicial, that the sheriff shall distrain the mesne to acquit the tenant, and to be at a certain day before the justices, for to shew why he hath not acquitted him before; and when they have not proceeded unto the great distress, the plaintiff shall be heard.*

judged within this statute. 2 Inst. 375.—West. 2. 13 E. 1. cap. 55. enacts that for all things recorded before the King's justices, or contained in fines (whether contracts, covenants, obligations, services for customs acknowledged, or any other things inrolled) a writ of execution shall be within the year, but after the year a sci. fa. whereupon if satisfaction be not made, or good cause shewed, the sheriff shall be commanded to do execution. In like manner also shall the ordinary be commanded in his case. * Howbeit, as concerning a mesne, who by recognizance or judgment is bound to acquit what is said before (viz. in this act of 13 E. 1. cap. 9. s. 18.) must be observed Lord Coke says that

* This clause was added in *majorum rei cautelam*, that the provision made by the statute of 13 E. 1. cap. 9. [S. 18.] viz. In case that in a writ of mesne, after the mesne is come into Court &c. and whereupon forejudger is given [as appears by the following clause, or s. 19.] Now if the plaintiff in the writ of mesne should only take his sci. fa. then no forejudger should follow thereupon; therefore this clause in the above act of 13 E. 1. cap. 45. at the end thereof, viz. (concerning a mesne &c.) was added, that the former general words of the said act. viz. (* or any other things inrolled &c.) should not take away the benefit of the former act, [viz. 13 E. 1. cap. 9.] concerning the forejudger in a writ of mesne, but this act [viz. 13 E. 1. cap. 45.] being in the affirmative takes not away either the common law, or the benefit of the former act concerning the forejudger. For the plaintiff may take benefit of either the one or the other at his election. But note, the forejudger is given only against him that made the acknowledgment, or against whom judgment is given, and not against his heirs, and therefore this act is an addition declarative to the former, viz. that a sci. fa. may in these cases lie against the heir. 2 Inst. 471. Upon the words of the statute 13 E. 1. cap. 45.—This is cap. 44. in Rast. Stat. but in Keble's Stat. it is as here. * These words are in Keble's Statutes, but not in Rastal's.

This branch gives damages and forejudger, and the

S. 19. *And if the plaintiff can prove that he hath not acquitted him, he shall yield damages, and by award of the Court the tenant shall go quit from the mesne, and shall attune unto the chief lord.*

plaintiff cannot take damages and leave the forejudger, but he must either take both according to this branch, or neither of them. 2 Inst. 375.

S. 20. *And if he come not at the first distress, a writ shall go forth to distrain him again, and proclamation shall be made, and as soon as it is returned, they shall proceed in judgment, as afore is said.*

Here the tenant has election either to take the benefit

S. 21. *And it is to be understood, that by this statute tenants are not excluded, but they shall have a warranty of the mesnes and their heirs, if they be impleaded of their lands, as they have had before.*

of this act by taking the process given by the same, or to take the process at the common law; and this

this was abundans cautela ; for this statute being in the affirmative the tenant might have had election if this clause had not been, but abundans cautela non nocet : and the ancient sages of the law did ever make things as plain, and leave as little to construction as might be. 2 Inst. 375.

S. 22. *Nor shall the tenants be excluded, but that they may sue against their mesnes, as they used heretofore, if they see that their process may be more available by the old custom than by this statute.*

S. 23. *And it is to wit, that by this statute no remedy is provided to any mesnes, but only in the case where there is but one only mesne between the lord that distraineth and the tenant.*

So that no forejudger can be but when there is but one 2 Inst. 375.

mesne between the lord paramount and the tenant.

S. 24. *And in case where that mesne is of full age.*

be not excepted by the words, yet by good construction she is. Though a feme covert 2 Inst. 375.

S. 25. *And in case where the tenant may attorn unto the chief lord without prejudice of any other than of the mesne, which is spoken for women, tenants in dower, and tenants by the curtesie, or otherwise for term of life or in fee-tail, unto whom for certain causes remedy is not yet provided for, but (God willing) there shall be at another time.*

* These words were specially intended of tenant in dower, or for life, or in tail with a remainder

over ; for against them no forejudger shall be given, but their extent is much larger.—If disseisor or any other that hath a defeasible title in the tenancy doth forejudge the mesne, this shall not prejudice the disseisee, or him that right hath ; for they are within the remedy of these words, viz. that every forejudger ought to be *sine præjudicio alterius*. 2 Inst. 375.—So if the mesne is disseised, and a forejudgment is had against the disseisor ; this does not bind the disseisee. Co. Litt. 100. b.—But if the daughter forejudge the mesne, and a son is born after the fore-judgment, the son shall not avoid it ; for it was *sine præjudicio alterius*, when the judgment was given. 2 Inst. 375.—S. P. Co. Litt. 100. b. because he had no right at the time of the forejudgment.—So it is if the tenant enter into religion, and his heir forejudges the mesne, and then the ancestor is disinherited, he shall be bound, *causa qua supra*. Co. Litt. 100. b.—If two jointenants bring a writ of mesne, and the one is summoned and severed, and the other sueth forth, he cannot forejudge the mesne ; because he cannot respondere capitali domino de eisdem servitiis & consuetudinibus, quæ prius facere debuit prædictus medius. 2 Inst. 375.—So it is if there be two joint mesnes, and the one appears, and the other makes default, no forejudgment shall be for the same cause necessarily collected upon the same words. 2 Inst. 375.—They that are seised in *auter droit*, as the bishop in right of his bishoprick, or the abbot or prior in the right of his monastery, or the like, shall neither forejudge, nor be forejudged ; because it is to be intended, that it cannot be done *sine præjudicio alterius* ; for that consent of them is not had, which by law to the alteration of any estate is requisite, as the dean and chapter to the bishop, and the convent to the abbot, prior &c. 2 Inst. 375, 376.—If the mesne hanging writ of mesne against him alien by fine ; albeit the right of the mesnalty passeth to the conusee, yet the mesne may be forejudged, and the conusee shall not take advantage of those words, *sine præjudicio alterius* ; because he came to the mesnalty *pendente brevi*, and in judgment of law, the mesne (as to the plaintiff) remains seised of the mesnalty ; for, *pendente lite nihil innovetur*. 2 Inst. 376.

(B) Of what Thing.

[1. IF a man prescribes to be acquitted of all services, he ought to be acquitted of relief. 39 H. 6. 31. adjudged.]

[2. If the tenant is distrained for more service, than the mesne ought to pay to the lord paramount, the mesne is not bound to acquit him of the surplussage but only of the other. 39 H. 6. 31. b.]

* *Acquittal* is compounded of *ad* and the old verb *quietare*, and signifieth in law to discharge, or keep in quiet, and

(C) * *Acquittal. What Thing will be good Cause to have Acquittal.*

[1.] If the lord confirms to the tenant to hold by less services, a writ of mesne lies upon it. 30 E. 3. 13. (It seems it is intended *with warranty*; for there is a parlane of warranty of charters upon the deed.)]

to see that the tenant be safely kept from any entries, or other molestation for any manner of service issuing out of the land to any lord that is above the mesne; and hereof cometh acquittal and *quietus est*, (that is) that he is discharged; and he that is discharged of a felony &c. by judgment is said to be acquitted of the felony, *acquietatus de feloniam*; and if he be drawn in question again, he may plead *auterfoits acquit*. And therefore if tenant being religious holds in frankalmoign, be distrained by any lord paramount, the mesne (to keep the tenant quiet) may put his beasts in the pound instead of the beasts of the tenant. Co. Litt. 100.

There are two kinds of acquittals, one *express* and the other *imply'd*. The *express* is three manner of ways. 1. By *fine or deed*, either at the creation of the tenure or after. 2. By *acknowledgment of acquittal*. 3. By *prescription*.—*Imply'd* is five manner of ways. 1. By *owelty of services*. 2. By *tenure in frankalmoigne*. 3. In *frankmarriage*. 4. By *homage auncesfeil*. 5. In *dower*. 2 Inst. 373.—F. N. B. 136. (A) (B) (C)—Co. Litt. 100. S. P.

[2. If before the statute of *quia emptores* a man by deed had made a *feoffment* of land *with warranty* to hold by certain services without any word of *acquittal* in the deed, no writ of mesne lies upon it. 30 E. 3. 24.]

3. *Frankmarriage* is cause of acquittal, and therefore upon this lies writ of mesne; per Hanke J. *quod nota*. Br. Mesne, pl. 20. cites 12 H. 4. 9.

Litt. S. 141.

4. Note that *tenure in frankalmoign* is good cause of acquittal. Br. Mesne, pl. 13. cites 38 H. 6. 12. 21.

5. And *prescription of acquittal* is good cause of acquittal. Ibid.

* Orig. (distrein,) but should be *distreignera*.

6. Lord, mesne and tenant; the mesne grants his *mesnalty* to A. for life, the remainder to C. in fee; A. brought *per que servitium* against the tenant, who said, that he is ready to attorn saving to him the acquittal; and A. granted the acquittal, by which the tenant attorn'd, and after A. died, he in remainder, never shall *distrein* for the services, till he had confess'd the acquittal likewise; for otherwise the tenant shall be charged to the lord, and also to the mesne. Br. Mesne, pl. 18. cites 18 E. 4. 7.

[375] (C. 2) *Acquittal enforced. How. And what amounts to it.*

So if the mesne do acknowledge acquittal by fine, and sueth a *scire facias* thereupon, and

1. If a man has judgment to recover his acquittal in a writ of mesne, and he be not afterwards acquitted, he shall have upon the recovery a *distringas ad acquietandum* &c. if it be three or ten years after the judgment given; and that is given by the statute Westm. 2. cap. 9. F. N. B. 136. (S)

the appeareth not at the return of the writ, then shall issue a writ of *distringas ad acquietandum* &c. and an *alias* and *pluries* &c. until he appear; and if he come upon the *distringas*, and cannot plead any

any thing, but that he ought for to acquit him, then the plaintiff shall recover *damages* against him. F. N. B. 136. (S)

2. *And* if the ancestor do acknowledge an acquittal in a Court of Record, the tenant shall have a *scire facias* against the heir to acquit him without other specialty &c. F. N. B. 136. (T).

But notwithstanding such acknowledgment of the

acquittal, in a writ of mesne against the heir he may plead, that he had nothing in the seigniorie without shewing how, as that it was denied &c. Contra of his father who acknowledged &c. F. N. B. 136 (T) in the notes there (a) cites 28 E. 3. 93.

3. *And* if a man recover acquittal in a writ of *mesne* &c. he shall after have a *distringas ad acquietandum*, and if he do not appear, he shall be forejudged, by default, of his mesnalty; and so if he appear, and it be found by verdict against him, he shall be forejudged. F. N. B. 136. (U).

4. The *mesne* by licence of the tenant may put his beasts into the land of the tenant, and there if the beasts of the tertenant are removed for the time, so that none are there but the beasts of the mesne for the lord to distrain, this is a good acquittal; and it is better acquittal than payment of the rent or services. Br. Mesne, pl. 14. cites 28 H. 6. 6.

(D) For what Causes it lies.

[1.] If the tenant be *distrained for services*, where nothing is arrear, if the mesne upon notice of it doth not put his beasts in the pound and take the beasts of the tenant out, and upon this sue a replevin, writ of mesne lies against him. Co. 9. Avowry. 22. b. (Quære this; for it seems he may join the tenant if he sues replevin, and so aid him.)

S. P. Br. Mesne, pl. 26. cites 34 H. 6. 47.

[2. If the tenant be *distrained*, and *avowry* made upon the mesne for services, where nothing is due, yet if the mesne upon request will not join the tenant and plead it, a writ of mesne lies against him; because the tenant * could not plead this plea, being a stranger to it. 10 H. 6. 26. 17 E. 3. b. 39 E. 3. 34. b. Dubitatur. 17 E. 3. 15.]

* Fol. 126.

[3. If in *replevin* by the tenant the *avowry* be made upon the mesne in such manner that it is *abateable* by the mesne, yet if the mesne will not join to the tenant to abate it, and the tenant cannot abate it because he is a stranger to the *avowry*, writ of mesne lies. 10 H. 6. 26.]

[4. As, if the *avowry* be made upon the mesne for relief as heir to his father, if he had a brother who was seised of the mesnalty after the death of the father, and so the *avowry* ought to be upon him as heir to the brother; yet because the tenant being a stranger to the *avowry* cannot plead it, writ of mesne lies; for [376] he is distrained in his default. 10 H. 6. 26.]

[5. If there are several mesnes one after the other, and the lord paramount, or any of the mesnes distrain the tenant, though it be not in default of the mesne who is the nearest to the tenant, yet

the tenant shall have writ of mesne against him; for he may have his remedy over. 29 E. 3. 34. Adjudged. 39 E. 3. 19. b.]

See (G) —

S. P. Br.
Mesne, pl.

26. cites 34

H. 6. 47.

But when

the tenant

is grieved and

has acquittal,

[6. If there are lord, two mesnes and one tenant, and the tenant brings writ of mesne against his mesne, this mesne may have writ of mesne against his mesne, because he was vexed with a writ of mesne by the tenant in his default. 18 H. 6. 33. 17 E. 3. 44. 7 H. 4. 18. b. 18 E. 3. 19. 29 E. 3. 24.]

he has no other remedy but to resort to him of whom he had acquittal.

[7. So if there are several mesnes, each shall have his writ against his mesne, after he himself is charged in writ of mesne. 17 E. 3. 44. 39 H. 6. 31. b. Curia.]

[8. But a mesne shall not have writ of mesne against his mesne, before that he himself is charged in writ of mesne. 19 E. 3. 44.]

The distress

must be

taken for the

customs or

services

which the

tenant, by

reason of his

tenure ought to do

to the lord; within which

suit-service to a hundred is

comprehended, but not suit-

real, which is by resiancy either to an hundred, leet, or tourn; for this is not by reason of his

tenure. 2 Inst. 273. — F. N. B. 137. (A).

9. See in the additions of writ of mesne in natura brevium, that where there is lord, mesne, and tenant, and the tenant is distrained for the suit to the hundred, or for resiancy, writ of mesne does not lie; for it shall be done by him who is resiant. Br. Mesne, pl. 30. cites 4 E. 3.

to the lord; within which suit-service to a hundred is comprehended, but not suit-real, which is by resiancy either to an hundred, leet, or tourn; for this is not by reason of his tenure. 2 Inst. 273. — F. N. B. 137. (A).

(E) Equality. What shall be said an Equality to have Acquittal.

S. P. Br.

Mesne, pl.

5. cites 11

H. 4. 52.

[1. Equality of services, as if the tenant holds of the mesne by the same services as the mesne holds over, this is good cause of acquittal to have this writ. 11 H. 4. 52. 3 H. 6. 42 b. Fitz. Na. 136. (B) 39 H. 6. 29. 19 E. 4. 8. 4 H. 6. 28. 30 E. 3. 24.]

[2. Services will acquit services of the same nature. 22 E. 3. 3. b.]

F. N. B.

136. (F) —

In Mesne,

because the

plaintiff was

distrained by

A. lord pa-

ramount, in

default of C. the defendant who is mesne, where the tenant held of the mesne by 20s. and the

mesne over of the lord by 1d. and so bound him by equality of services; this is good equality; per

tot. Cur. for where the tenant holds of the mesne by so many services as the mesne holds over, it

suffices; and here the 20s. is equal with the 1d. and more; but where the tenant holds of the

mesne by 20s. and the mesne over by 30s. there is no equality. Note the diversity. Br. Mesne,

pl. 9. cites 4 H. 6. 28.

[3. If the tenant holds by more services of the mesne than the mesne holds over, as by more rent or other services, yet this is good cause of acquittal to have this writ; for he holds of the mesne by the same services as the mesne holds over and more. 4 H. 6. 28. Adjudged. 18 E. 3. 19. b. 39 E. 3. 19. b.]

where the tenant held of the mesne by 20s. and the mesne over of the lord by 1d. and so bound him by equality of services; this is good equality; per tot. Cur. for where the tenant holds of the mesne by so many services as the mesne holds over, it suffices; and here the 20s. is equal with the 1d. and more; but where the tenant holds of the mesne by 20s. and the mesne over by 30s. there is no equality. Note the diversity. Br. Mesne, pl. 9. cites 4 H. 6. 28.

[4. But if the tenant holds by 20s. and the mesne by 30s. this shall not be equality to have acquittal. 4 H. 6. 28.]

[5. If the tenant holds by rent for all services of the mesne, and the mesne holds over by rent and homage, this shall be good acquittal

quittal for the rent; for it is of one and the same nature. 22 E. 3. b. 30 E. 3. 4. Admitted.]

[6. *But otherwise it is for the homage; because this is not of the same nature with the rent. Dubitatur. 22 E. 3. 3. b. [377] Contra. 30 E. 3. 4. Admitted.*]

(E. 2) Acquittal. *Ousted* or set aside; *By what.*

1. **I** F a man has acquittal against his lord, and a stranger brings a *præcipe quod reddat* of the rent against the lord, and recovers, the tenant shall be bound by this recovery, and shall lose his acquittal. Br. Mesne, pl. 23. cites 37 H. 6. 33. 34. per Prisot and Danby.

Brooke makes a *quare*, if this is not meant where the recoverer recovers the rent by

just title; for if it be faintly, the tenant may falsify the recovery (which seems to be true) by the statute of 7 H. 8. 4. which wills, that recoverer who recovers land for trust, &c. may distrain and make avowry upon the tenant, as the party who suffered the recovery might have done, if no recovery had been suffered; * but recovery against the lord shall bind the tenant, and recovery against the tenant binds the lord, and shall change his avowry; but in this case the recoverer was put in seisin of the rent recovered by payment of 2d. by the tenant, but the case of the statute supra is, where the recoverer cannot obtain seisin nor attornment of the tenant. Ibid.—* Br. Judgment, pl. 51. cites 37 H. 6. 35.

(F) *Who shall have it*, in respect of the Estate.

[1. **T**ENANT in tail shall have writ of mesne against donor for equality. 12 H. 4. 9. 21 E. 3. 49. in the time of E. 1. Age 120.]

[2. Feme tenant in dower shall have a writ of mesne against the heir of her baron; for she is attendant to him for the third part for equality of service. 28 E. 3. 95. Admitted in the time of E. 1. Age 119. per Berr.]

Fol. 127.

3. The baron and feme shall have a writ of mesne, where they are distrained for the lands of the feme. F. N. B. 136. (I).

(G) In what Cases the * Writ lies.

[1. **I** F upon the reversion of the tenure it be limited that the tenant shall do the services to the lords paramount, he shall not have writ of mesne for distress for rent by the lords paramount; because he himself is bound to pay it for the mesne to the lords paramount. 49 E. 3. 10. b. 21 E. 3. 49. 22 E. 3. 3. b.]

See (D).—
* Breve de medio, a writ of mesne so called by reason of the words of the writ of mesne, which are,

Unde idem A. qui medius est inter C. & præfatum B.—A. is mesne between C. that is the lord paramount, and B. that is the tenant paravail. Co. Litt. 100.

[2. If lord mesne and tenant are by equality of service, if the lord distrains the tenant for such services as lie in payment of money, as relief or rent, he shall not have writ of mesne against his mesne; for he himself is bound to pay it for his mesne. 49 E. 3. 10. b.]

S. P. For these are not corporal services. Br. Mesne, pl. 25. cites S. C.

[3. *But*

Br. Mesne,
pl. 25. cites
49 E. 3. 10.

—If the
tenant be

distrained for the * *relief of the mesne, or for reasonable aid*, albeit they are rather improvements of services than services, yet the tenant shall have a writ of mesne; because they grow by reason of the tenure. 2 Inst. 373.—F. N. B. 136 (M).—* S. P. tho' it be only a thing personal; quod nota. Br. Mesne, pl. 14. cites it as agreed 28 H. 6. 6.

[378]
Where there
be lord two
several

mesnes and

tenant, and the mesne paravaile releases to the tenant to hold by 2 d. for all services and faciendū capitali domino servitia debita, in this case the tenant shall do these services for the mesne, and as to the mesne who reserves it, and not * for himself; for he shall not hold of both. Br. Mesne, pl. 25. cites 49 E. 3. 10.—* Orig. (per luy mesme.)

S. P. Br.
Mesne, pl.
25. cites
S. C. and
his mesne
shall have
other writ
of mesne;
for he is not

[5. But if lord two mesnes and tenant are by equality of services, and the tenant is limited upon the reservation to do the services paramount for his mesne, and the lord distrains for rent or fealty, the tenant shall have writ of mesne against his mesne; because he is not bound to pay the services for the first mesne, 49 E. 3. 10. b.]

bound to discharge this mesne of any services, but his immediate mesne; and so see diversity where these words faciendū domino capitali servitium debitum shall hold place to oust the tenant of his writ of mesne, and when not.

[6. And so each may have writ of mesne against the other, 49 E. 3. 10. b.]

[7. If tenant by 12s. had made feoffment before the statute to hold by 12s. that is to say to pay to the feoffor 2s. and to the lord paramount the other 10s. if the feoffee be distrained by the lord paramount for 12s. rent he shall not have writ of mesne for non-acquittal of the 10s. because he himself might pay it. 30 E. 3. 4. adjudged.]

8. If there be lord mesne and tenant, and the mesne grants to the tenant to acquit him against the lord and his heirs, and after the lord dies, and the feme of the lord is indowed, he shall acquit him against the tenant in dower. Br. Grants, pl. 147. cites 31 E. 1.

If the mesne
hath paid
the services
to the lord
paramount,
yet if the
tenant be
afterwards
distrained
for those
services, he
shall have
a writ of
mesne. R.
N. B. 136.
(11).—

9. The plaintiff counted that he held of the defendant by 10s. and that he is distrained for 6s. by the lord paramount; and the defendant said that not distrained in his default, Clam. [for the plaintiff replied] we held of the defendant who held over of one W. who held over of one R. and we are distrained by R. lord paramount, where there are two mesnes between us and R. lord paramount; and yet if the mesne paravaile pays the services to W. his next mesne to him, and W. does not pay to R. lord paramount, so that R. distrains the tenant paravaile, there the tenant shall have writ of mesne against his next mesne, and as it seems this compelled him to take other writ of mesne against the said W. the high mesne; but per Knivet the issue of the defendant is good, and then quære what remedy for

for the tenant; but Brooke says the law seems contrary to Knivet, which see title Mesne in Fitzh. 35. 18 E. 3. 19. Br. Mesne, pl. 11. cites 39 E. 3. 19.

Though the services of the mesne are not in arrear, yet

a writ of mesne lies; because the tenant cannot plead *viens arrear*. Ibid. in the notes there (a) cites 39 E. 3. 34. Contra 17 E. 3. 15. and adds see 39 E. 3. 19. and 11 H. 4. 52.

10. Lord, mesne and tenant; the lord avowed upon the mesne for reasonable aid to make his son a knight, where the lord had released to the mesne, &c. There the tenant cannot plead this release, but may pray the mesne to join to him, and upon the joinder they may plead the release; and if he refuses to join, the tenant shall have writ of mesne and recover damages; for to such intent is the joinder of the mesne to the tenant to plead such pleas as the tenant cannot plead; for a stranger to the avowry cannot plead in bar to it. Br. Mesne, pl. 12. cites 39 E. 3. 34.

11. In replevin, it is said that if the lord paramount distrains the tenant paravaile, and he requires the mesne to put his beasts in pledge for the beasts of the tenant, and he refuses, the tenant shall have writ of mesne upon this special matter; quod conceditur per tot. Cur. Br. Mesne, pl. 4. cites 7 H. 4. 18.

A. is lord, B. mesne, C. mesne, and D. tenant; A. distrains B. for services, D.

brings writ of mesne against C. and recovers; it seems, that notwithstanding the recovery against C. yet if B. had no notice of the distress, or if his services were not arrear, a writ of mesne lies not against him by C. any more than it lies against C. without notice, when his services were not in arrear; for in that case there is no default in him. F. N. B. 136. (H) in the notes there (b) cites 7 E. 4. 18.

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12. The mesne ought to acquit the tenant against all the lords paramount. F. N. B. 135. (M) Marg. cites 18 H. 3. Mesne, 78, and 29 E. 3. 34. acc.

13. If there be lord, mesne and tenant and the tenant is distrained by the lord, for which he brings a replevin, the lord avows upon a stranger, the tenant may have a writ of mesne; yet the mesne cannot join, because the avowry is made upon a stranger. F. N. B. 135. (M) Marg. cites 13 E. 4. 16.

14. If the mesne grants to the tenant to acquit him after the tenure made, Fitzherbert conceived that he should have a writ of mesne. F. N. B. 136. (H).

In the time of E. 1. the tenant brought a writ of

mesne because he did not acquit him of a rent-charge demanded, having by deed bound him and his heirs to warrant and acquit him and it was maintainable. F. N. B. 136. (P).

15. If the mesne's beasts are impounded for those of the tenant, he shall have a replevin of them, and so may each mesne have &c. And if any mesne refuse to do so, the tenant shall have a writ of mesne; per Cur. F. N. B. 136. (H) in the notes there (b) cites 7 H. 4. 18.

16. If the avowry is abateable, or if no services are due or arrear, yet if the mesne will not join on request with the tenant, a writ of mesne lies; for the tenant being a stranger shall not plead in abatement of the avowry. Ibid.

(H) Mesne,

(H) Mesne, [at what Time the Writ lies.]

[1.] **I**F there be an equality of tenure, scilicet, of homage between lord mesne and tenant, the tenant shall not have writ of mesne upon the distress of the lord paramount, before he himself hath made or tendered homage to the mesne. 30 E. 3. 24.]

2. If there be two tenants, and one brings replevin upon a distress taken by the lord, the mesne cannot join to the plaintiff, unless the other jointenant first joins to the plaintiff; for the one alone does not hold of the mesne, but both hold of the mesne. Br. Jointenants, pl. 35. cites 12 E. 4. 2.

(H. 2) At what Time; Before Notice or not.

Br. Notice,
pl. 21. cites
15 H. 6.
and Fitzh.
Mesne 2.

[1.] **I**F the tenant be distrained by the lord for such services as the lord holds of the mesne, he shall have writ of mesne without giving notice to the mesne; but if he be distrained for other services than those by which the tenant holds of the mesne, he shall give notice to the mesne before he shall have writ of mesne, which see in Old Nat. Br. in the Additions. Br. Mesne, pl. 31. cites 15 H. 6.

[380] (H. 3) What the Mesne may do in Ease of the Tenant.

But Brooke
says it seems
to him, that
if the defen-
dant pleads,
that ne prius
pas, the
plaintiff may

1. **L**ORD, mesne and tenant are; the lord distrain'd the tenant, the mesne may take his beasts out of the pound, and put his beasts into it, in spite of the lord, and shall have replevin of them, tho' his beasts were not taken. Br. Mesne, pl. 24. cites 13 E. 4. 6.

reply by the special matter, which is, lord, mesne and tenant, and the lord distrains the tenant, and he takes out his beasts and does not send his own beasts, and of them takes replevin, quare if he shall conclude & sic cepit &c. as upon sic dedit when a man brings formedon of land recovered in value which was not given. Ibid.

(I) Who shall have the Action.

[1.] **H**E only, who is tenant to the mesne, shall have the writ. 17 E. 3. 39. b.]

Br. Mesne,
pl. 34. cites
S. C.—
F. N. B.
136. (G)

[2. A lessee for life of the tenancy shall not have writ of mesne where there is a reversion over; for then he holds of the reversion. 17 E. 3. 39. b.]

S. P.—But tenant in dower shall have writ of mesne against him in reversion; because she has her estate by the law: Ibid.

[3. If

[3. If lessee for life be of the tenancy, the *remainder in fee to another*, the lessee shall have writ of mesne; because he is tenant to the mesne. 17 E. 3. 39. b.]

Br. Mesne, pl. 34. cites S. C.—But then he must count ac-

ording to his case. F. N. B. 136. (G) in the notes there (c) cites 13 E. 3. Mesne 12. 17 E. 3. 39. b.

[4. If lord, two mesnes and tenants are, and the last mesne purchases the tenancy for life, he shall have writ of mesne against the first mesne; for he continues tenant to him. 17 E. 3. 39. b.]

5. Tenant in dower shall have writ of mesne. Br. Mesne, pl. 34. cites V. N. B. and pl. 35. cites Fitzh. Age 119. in the time of E. 1.

6. So of tenant in tail. Br. Mesne, pl. 32. cites Ancient Tenures. tit. Frankmarriage, and pl. 35. als. 36. cites Fitzh. Age 119. in the time of E. 1. F. N. B. 136. (K).

7. An abbot sued a writ of mesne by reason of the confirmation made to him in frankalmoign, and it was maintainable. F. N. B. 136. (Q)

Where an abbot, or such a man of religion, holds his

tenements of his lord in frankalmoign, his lord is bound by the law to acquit him of every manner of service, which any lord paramount will have or demand of him for the same tenements; and if he doth not acquit him, but suffereth him to be distrained &c. he shall have against his lord a writ of mesne, and shall recover against him his damages and costs of suit &c. Co. Litt. 99. b. f. 141.—This extends to all ecclesiastical persons, that hold in frankalmoign, be they secular or regular; for the mesne ought to acquit all of them; for they be bound to make prayers for their founder and his heirs, and in consideration of those prayers the founder &c. is bound to pay to the chief lord all rents and services issuing out of that land. Co. Litt. 99. b.

(K) Against whom it lies.

[1. THE writ lies only against him, who is tenant to the lord paramount.]

[2. If the mesne grants over the mesnalty to another for life, and tenant attorns, the writ of mesne does not lie against him in the reversion for non-acquittal during the life of grantee for life; for he is the lord. 17 E. 3. 31. b.]

Fol. 128.
The tenant shall not

have a writ of mesne against the grantee for life. F. N. B. 136. (K).

[3. If there be a lessee for life of a mesnalty, the remainder to another in fee, the writ of mesne lies against the lessee for non-acquittal, because he is tenant to the lord paramount.] [381] F. N. B. 136. (L).

4. The tenant shall not have writ of mesne against the grantee before attornment; and so note, that he holds yet of the heir of the grantor till attornment, and shall charge him with the acquittal. Br. Mesne, pl. 1. cites 49 E. 3. 7.

5. Writ of mesne shall be maintainable against the heir of the mesne, where his ancestors have granted the services of the tenant by fine, if the tenant has not attorned according to the fine; for he shall not be compelled to attorn without granting acquittal to him; and if he grant acquittal he shall have writ of mesne upon the grant; and yet it commences after the tenure. F. N. B. 136. (L).

(L) *How it shall be brought. [Actions and Pleadings.]*

[1. **A** Mesne shall have writ of mesne *without alleging in the count matter special*, (scilicet) that the tenant has brought a writ of mesne against him; for the defendant may well say not distrained in his default. 17 E. 3. 43. b. 18 E. 3. 19.]

2 Inst. 373.
S. P. and
cites S. C.

—A.
is lord, B.
mesne, C.
mesne, and
D. tenant.

[2. *But in this case when the defendant says not distrained in his default, plaintiff cannot say generally distrained in his default, but ought to disclose the special matter; for otherwise it shall not be intended to be brought for a recovery against him by his tenant.* 18 E. 3. 19.]

A. distrains D. for services; D. brings a writ of mesne against C. and recovers; C. brings a writ of mesne against B. and counts generally; B. pleads not distrained in his default, and the other replies contra, and the special matter is found *ut supra*, and that the services of B. were in arrear, but not the services of C. and it was held, first, That without some such *special mischief* the tenant in service, viz. the mesne shall not have a writ of mesne. Secondly, That in the case of such mischief he shall have it, and so each mesne shall have it against the other, till it come to him in whom the default is. 39 E. 3. 34. 39 H. 6. 31. 7 H. 4. 18. accordant. 3dly, That there ought to be a *special count*. 20 E. 3. Mesne 14. or at least a *special replication*, and that on the general issue found, this matter shall not aid him. F. N. B. 136. (H) in the notes there (b) cites the cases above-mentioned.

3. In writ of mesne, where *fine of acquittal* is levied between the lord and the tenant, by which the lord grants and renders the land to the ancestor of the plaintiff in tail saving the reversion, and rendring to him and his heirs 4s. rent for all services, and rendring to the chief lord and his heirs the services due for the mesne and his heirs; there the tenant shall have writ of mesne of the services, but not of the rent, unless he says that he offered it to the chief lord, and he refused to receive it; quod nota by award; for this thing the tenant himself ought to pay. Br. Mesne, pl. 8. cites 21 E. 3. 49.

4. In writ of mesne it is a good title, that you and those whose estate you have, acquitted me and those whose estate &c. Br. Prescription, pl. 51. cites 31 Aff. 23.

And the
pleading
was, that
the assise
was brought
against A.
B. and C.

5. In assise, lord mesne and three tenants are, the lord distrained for the rent of the mesne; the one of the tenants made rescous; the lord brought assise against the mesne and him who made the rescous, leaving out the other, and recovered. Br. Assise, pl. 330. cites 31 Aff. 31.

And A.

came and pleaded to the assise as tenant of parcel of the tenements put in view, out of which the rent arose, and B. said that he held jointly with E. not named. Judgment of the writ, and if &c. nul tort; and C. answered as tenant of other parcel, and said that E. is tenant of parcel of the tenements not named. Judgment of the writ &c. and if &c. nul tort; and the plaintiff said, that A. was intire tenant of the land put in view, out of which &c. and held of him the same tenements by the same rent, and the others are named but as disseisors, by which &c. And the assise was taken, which said, that A. held intirely the tenements by the same rent &c. And that the plaintiff was seised, and distrained for the rent arrear in the lands, and B. made rescous, and that B. held jointly with E. prout &c. and that E. was tenant of parcel prout &c. And because it was found that the plaintiff was

[382] *seised and disseised*, it was awarded, that the plaintiff should recover seisin and damages. And querens in misericordia against the others; and he recovered the arrears incurred after the verdict. Br. Assise, pl. 330. cites 31 Aff. 31.

6. The defendant said, that where the plaintiff has counted that he is distrained by J. our lord, he said that he did not hold the land of this J. Prist; and no plea by Finch. For if he holds of one who holds over of J. yet the writ well lies. Br. Mefne, pl. 2. cites 44 E. 3. 2. And by him, the defendant may disclaim in his feignery. Quere. Ibid. — Wherefore the defendant said, that not distrained in his default, and the plaintiff, upon this plea, had judgment to recover the acquittal; quod nota. But it was said that it was contrary. Mich. 30 E. 3. Ibid.

7. In writ of mefne, because the plaintiff held of the defendant by such services &c. of which services he is seised &c. and said that he is distrained by the lord paramount in default of the defendant for homage &c. The defendant said, that his father acknowledged the mesnalty to N. as that which he had of his gift, who granted and rendered it to the father again, and to M. his feme, and to the heirs of M. and that his father died, and so the plaintiff held of M. Judgment &c. And per Cur. it is no plea without saying that he attorned to this grant; quod nota; and the reason seems to be in as much as without attornment the grantee cannot avow upon the tenant, and by the same reason the tenant shall not have writ of mefne against the grantee before attornment. And so note, that he holds yet of the heir of the grantor till attornment, and shall charge him with the acquittal, and yet after the fine nothing can descend to the heir of the conusor. Br. Mefne, pl. 1. cites 49 E. 3. 7.

8. A. brought a writ of error against B. where B. brought a writ of right patent against him in Oxon, and made protestation to sue in nature of assise of novel disseisin, and made plaint of 9s. rent, to which A. said, that assisa non, for the said B. held the land of him as mefne by 9s. and that this A. is lord paramount, and he took so much rent of him as of his very tenant, and demanded judgment, if against him who is lord paramount of so much rent assise ought to be, and if he demanded other rent nul tort, &c. by which the said B. demurred upon the plea, because he did not give him colour, and prayed the assise, and the assise was awarded, and found for the plaintiff in the assise, by which he recovered; and because they awarded the assise without inquiry of the matter pleaded in bar they erred; and there it was agreed, that notwithstanding the defendant in the assise took not the tenancy of the (same) rent, but said of (so much) rent, and gave no colour, yet the bar is good; for when he said of so much rent, and to any other rent pleaded nul tort, it is well pleaded; and also he cannot say of the same rent; for the rent in the bar was the rent which the mefne ought to pay to the lord, and then the mefne cannot take rent of himself; and therefore because the assise was awarded without putting the party to answer to the bar, it is error; wherefore they awarded, that for this error and others the judgment be set aside in all, and awarded that the tenant in the assise be put in the same plight as he was before the judgment, and that the other be put to pursue further in this Court if he will, or have a new assise at his will. Br. Error, pl. 39. cites 50 E. 3. 18.

9. It is said in a note, that it is a good plea in writ of mesne for the defendant to say that the plaintiff has nothing in the land. Br. Mesne, pl. 22. cites 7 H. 4. 12.

10. The issue of donee [in frank-marriage] in the fourth degree, shall not have a writ as on a frank-marriage, but as on a gift in tail. F. N. B. 136 (B) in the notes there (a) cites 12 H. 4. 9.

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11. Where the defendant in writ of mesne pleads to the writ, because the mesnalty descended to him and his sister who is alive, the other may say, that after the descent partition was made, so that this mesnalty was allotted to the defendant, and well; quod nota. Br. Confess and Avoid, pl. 2. cites 3 H. 6. 42, 43.

F. N. B. 136.

(F) acc.—

2 Inst. 374.

acc.—

For the te-

nant who is

distrained

cannot abate

the avowry

of the lord by

his default,

if the mesne

will not join

to plead in abatement

of the avowry.

Ibid.—Also if the lord distrains the tenant for services of the

mesne which are not due, there the tenant cannot abate the avowry if the mesne will not join to plead

to it; quod nota, and therefore it is no plea to the writ of mesne. Br. Mesne, pl. 2. cites

10 H. 6. 26.

In mesne the defendant pleaded to the writ the death of the lord pending the writ; and per Cur.

* if this plea be good, it is to the action and not to the writ; but by the opinion of the Court it is

no plea. Brook makes a quere; for if process upon forejudger had been taken, there he cannot be

attendant to a dead person; but where no such process is taken, as here, it seems no plea. Br. Mesne,

pl. 9. cites 4 H. 6. 28.—* Orig. (sic eo son plea il).—But Hill. 21 H. 7. it was agreed per tot.

Cur. contra, viz. that where writ of mesne was brought, and the lord paramount died before the

judgment of forejudger, it shall abate the writ, and yet he is not party to the action, but he ought

to be party to the judgment. Kelw. 81. a. pl. 1.

12. If there are three lords, mesne and tenant, and the tenant is distrained for relief of the father of the mesne, and the mesne will not join to plead to the avowry, and the tenant brings writ of mesne, and the mesne pleads to the writ, that one of the lords is dead, non allocatur to the writ nor to the count; because death of a stranger shall not abate the writ nor count; for the judgment is no other upon forejudger, but that the tenant shall be attendant on the chief lord, which may be good, notwithstanding the death of the lord. Br. Mesne, pl. 28. cites 10 H. 6. 26.

Ibid.—Also if the lord distrains the tenant for services of the mesne which are not due, there the tenant cannot abate the avowry if the mesne will not join to plead to it; quod nota, and therefore it is no plea to the writ of mesne. Br. Mesne, pl. 2. cites 10 H. 6. 26.

In mesne the defendant pleaded to the writ the death of the lord pending the writ; and per Cur. * if this plea be good, it is to the action and not to the writ; but by the opinion of the Court it is no plea. Brook makes a quere; for if process upon forejudger had been taken, there he cannot be attendant to a dead person; but where no such process is taken, as here, it seems no plea. Br. Mesne, pl. 9. cites 4 H. 6. 28.—* Orig. (sic eo son plea il).—But Hill. 21 H. 7. it was agreed per tot. Cur. contra, viz. that where writ of mesne was brought, and the lord paramount died before the judgment of forejudger, it shall abate the writ, and yet he is not party to the action, but he ought to be party to the judgment. Kelw. 81. a. pl. 1.

13. And per Paston, Strange and Cottessmore J. if the mesne has issue a son and a daughter and dies, and after the son dies without issue, there if the lord paramount makes avowry upon the daughter, as heir of her father, after distress taken upon the tenant, the tenant in his writ of mesne may make the daughter heir to her father, without mention of the son. Ibid.

14. In writ of mesne, the writ was that he acquit him of the services which H. demanded of him de libero tenemento suo quod tenet de E. in J. unde predict. E. qui medius est inter eos eum acquietare debet; and so by the writ he supposed that E. is mesne, and in the count he said that H. distrained him after the death of J. father of E. for the relief of E. which does not suppose that E. is mesne but by argument, and therefore ill; per Prisot. Br. Mesne, pl. 13. cites 38 H. 6. * 12.

* It should be 21. b.

S. P. But

it was held

that the pre-

scription was

not good,

because it

was, That

he and his

ancestors

15. In writ of mesne, the abbot plaintiff counted that he held of the defendant 20 acres of land in frankmoign, and the defendant did not acquit him of the services, which J. demanded against him of his land in C. which he held of the defendant, of which the defendant is mesne between them, inasmuch as he held the said land in frankmoign, and that J. and all his ancestors whose heir he is, have acquitted

acquitted the plaintiff and his predecessors *versus quoscunque homines* time out of mind, and that J. had distrain'd him for fealty 10s. rent and suit of Court, and for relief after the death of H. father of E. the defendant whose heir he is, & *licet sepius requisitus &c.* he did not acquit him; the defendant said, that he and his ancestors, whose heir he is, have not acquitted the plaintiff and his predecessors of the said services modo & forma &c. and the others e contra, and found for the plaintiff; and it was alleged in arrest of judgment, that it was *jeofail* in as much as he does not count of the certainty of the tenure between E. the mesne, and J. the lord paramount; and also that the count is double, viz. the tenure in frankalmoign, and the prescription, where each is good cause of acquittal; and also that the prescription is to acquit him *versus quoscunque homines*, where writ of mesne does not lie, but to have acquittal against him who has tenure in those lands, and no other, but against others writ of covenant lies and not writ of mesne; and the opinion of Prisot and several other Justices was, that the * plaintiff ought to surmise the tenure between the mesne and the lord paramount in his count, and after they saw the book of Novæ Narrationes, which made no mention of the tenure between the mesne and the lord paramount, and it was of the prescription as above, therefore they would not vary from the course, and of this they awarded the count good, and that the prescription above is good against all the lords and void against all others; quod nota; and so it is found in this point, and of the rest nothing is found, and therefore a good verdict. And per Choke the count is not double; for he has rely'd upon the prescription only, and upon this is the issue taken; and per Prisot the plea is not double, because tenure in frankalmoign is not sufficient cause of acquittal unless he shews the gift, and therefore it is not double; for here he did not shew the gift; by which it was awarded that the plaintiff recover his acquittal against the said E. &c. Br. Mesne, pl. 14. cites 28 H. 6. 6.—[It should be 39 H. 6. 29.]

have acquitted the plaintiff &c. and did not say the defendant and his ancestors, whose heir he is; but because in one roll those words, (whose heir &c.) were written, and in another roll they were omitted, therefore it was amended per Cur. for it was misprision of the clerk, and so ill if it had not [384] been amended; quod nota. Br. Prescription, pl. 43. cites 39 H. 6. 31. 29.—* The Court held, that the plaintiff ought to surmise the tenure and the services, between the mesne and

the lord paramount, as well as between the tenant and the mesne. Br. Mesne, pl. 13. cites 38 H. 6. 12. And the same per Prisot eodem anno, fol. 21.—Note, That the plaintiff in a writ of mesne needs not in the count to shew the certainty of the tenure between the mesne and the lord paramount, but to say generally that he holds over. F. N. B. 135. (M) Marg. cites 38 H. 6. 12 & 39 H. 6. 29.—

16. Writ of mesne by an abbot against J. S. and counted that he and his predecessors time out of mind have held of the defendant and his ancestors in frankalmoign, and the plaintiff and his predecessors rendered annually to the defendant and his ancestors 1d. and the defendant and his ancestors have held over of W. N. by 12d. and so demanded acquittal of the 1d. by the tenure; and for the 11d. prescribed that the defendant and his ancestors have acquitted the plaintiff and his predecessors time out of mind, and that the plaintiff was distrained for 12d. by the chief lord, and the defendant had not acquitted him; and the defendant travers'd the prescription of the 11d. and so to issue, and found for the plaintiff; and it was alleged in arrest of judgment, that the declaration was double, one for the tenure in frankalmoign, which is an acquittal in itself by the

* Orig. (tantum) but it seems it should be (tamen).

So of such gift in tail after the statute &c. For al: that is done at the reservation of the tenure. Ibid.

the law, and another the prescription; but because the parties were at issue upon the one point only, viz. the prescription, therefore the doubleness is vain by several, and by some it is not double; for he demands several acquittances, one for the 12 d. and another for the 1 d. by owelty in frankalmoign, and the 11 d. by prescription,* but it was not admitted; and exception was not taken if he who held in frankalmoign, which is free of all other services, rendered 1 d. of rent or not. Br. Mesne, pl. 16. cites 4 E. 4. 35.

17. And per Billing, J. if lord and tenant were before the statute of tenures by 12 d. rent; and the tenant before the statute had given to hold of him by 1 d. and granted over to acquit him of the 11 d. now if he had been distrained by the lord for the 12 d. he should have had writ of mesne, and should demand acquittance of the 1 d. by the tenure, and of the 11 d. by the deed; quod non negatur. Ibid.

18. And if lord, mesne and tenant are at this day, and the tenant holds by 1 d. and the mesne over by 12 d. and the mesne by deed grants to the tenant, reciting the tenure &c. to acquit him of the 11 d. he shall have writ of mesne, and declare upon the tenure for 1 d. and upon the deed for 11 d. per Billing J. but Markham Ch. J. contra; for he shall have writ of mesne of the 1 d. and writ of covenant upon the deed for the 11 d. for this came after the tenure. Billing said this was the ancient usage, but it is contra at this day, in avoiding of circuitry of action; as where a man after the lease, grants to the particular tenant to hold without impeachment of waste. Ibid.

[385] 19. Mesne against N. supposing that he was distrained by the lord of W. for 100s. relief &c. in default of the defendant, and counted that he held of the defendant by knight's service; and the defendant said, that the land is out of the fee and seignior of the lord of W. And it was argued if it be a good plea, or if he shall traverse the tenure; but at last the plea was adjudged good, and the issue was accepted. Per Danby, the issue shall be, if the land be held of him or not. Per Littleton contra, for the issue shall not be so, but where it is counted that he held &c. and it is not so in the count, by which the issue supra was accepted. Br. Mesne, pl. 10. cites 9 E. 4. 27.

20. Writ of mesne against A. B. inasmuch as the plaintiff held of him, and he over of J. S. and that the plaintiff is distrained by J. S. in default of the defendant, and that he ought to acquit him; Sulyard demanded judgment of the writ; for where the plaintiff has supposed that he held of us, and we over of J. S. we say, that we hold over of J. S. in jure M. uxoris ejus; and not otherwise; and per tot. Cur. except Chocke, it is a good plea to the writ; for otherwise per Brian, the mesne shall be drove to two acquittals, the one against J. S. only by this conclusion, and against J. S. and his feme for cause of tenure. Br. Mesne, pl. 19. cites 22 E. 4. 35.

Yet see in a writ of mesne on a deed of acquittal

21. Ancient demesne is a good plea in a writ of mesne. F. N. B. 136. (K.)

by the tenant the defendant alleged that the lands are held of the manor of S. which

is ancient demesne, and it was not allowed, but was put to answer to the deed. F. N. B. 136. (K) in the notes there (d) cites 34 E. 1. Mesne 38.—But see in a writ of mesne by *tenant in dower* against the *heir*, who *alleges* that the tenements are held of the manor of C. which is ancient demesne, and tho' it was said, that one cannot have *process of forejudging on proclamations* in a Court of ancient demesne, and that the heir cannot be distrained there, because he has only the services &c. yet it was awarded that he should take nothing; and it was said, that *this pleasball be pleaded in a petit writ of right in the Lord's Court, and that he shall make protestation &c.* F. N. B. 136. (K) in the notes there (d) cites 28 E. 3. 45. acc. 30 E. 3. 12. per Skipw.

22. It was agreed that where there are *lord, mesne and tenant*, the *tenant may plead release made to the mesne*; to which Fitzherbert J. agreed. Br. Releases, pl. 25. cites 14 H. 8. 4.

(L. 2) Process and Proceedings.

See (A. 2)
S. 11, 12,
13, 14, 15.

1. **T**HE writ of mesne ought to be brought *in the county where the lands lie*, and if *nihil* be returned against the lord, a writ shall issue to another sheriff on a *testatum*. F. N. B. 135. (M) in the notes there (b) cites 29 E. 3. 3.

2. If in writ of mesne against two the one appears, and the other makes default, distress with proclamation shall not issue against the other who made default; for the plaintiff cannot recover the acquittal by the default of the one where the other appears, and the one shall not answer without the other; per Thirn. and Hanke. But Brook makes a quære thereof; for otherwise it seems when the process is determined against the one; for then if the other be convicted judgment shall be against both, the one by default and the other by conviction. Br. Mesne, pl. 21. cites 14 H. 4. † 27.

Br. Process,
pl. 45. cites
S. C.
* Orig. is
(receive.)

3. If the sheriff returns *nihil* upon summons, and upon the attachment, and upon the distress in writ of mesne, yet the plaintiff may have judgment of forejudger against the mesne by the statute, as well as if all the process had been returned served; quod nota, in a quare impedit. & non negatur. Br. Mesne, pl. 29. cites 11 H. 6. 3.

† It should
be (37.)

4. The writ may be sued and removed out of the county at the suit of the plaintiff by a *pone* without cause, and at the suit of the defendant with cause shewn, as in a replevin. F. N. B. 136. (A)

5. The men of Cornwall claim to plead a plea in a writ of mesne in the county without writ, and that they had an allowance thereof in eyre. F. N. B. 136. (D).

6. Tho' writ of mesne be depending betwixt the mesne and tenant paravail, yet the lord shall distrain the tenant paravail for the rents and services, and not tarry till the writ of mesne be ended betwixt them, whether he ought to acquit the tenant or no. F. N. B. 136. (D).

7. Tho' the lord dies pending the writ of mesne, yet the writ shall not abate. F. N. B. 136. (F).—2 Inst. 374.—Br. Mesne, pl. 28. cites 10 H. 6. 26. S. P. as to the death of one of the lords.

[386]
Kelw. 81.
pl. 1. con-
tra. See
(L.) pl. 12.

The process at common law was summons, attachment, and distress infinite in the same county where the writ was brought. Co. Litt. 100.— The plaintiff in a writ of mesne may choose either the process at common law or upon the statute of Westm. 2. Co. Litt. 300. b.

8. *The process in a writ of mesne is summons, attachment, and distringas; and if the defendant hath not any thing in the county, by which he can be distrained, then the plaintiff may surmise that he hath assets in another county, and pray a distringas thither, and he shall have it by the statute; and upon that he shall be forejudged &c. if he do not appear, and the writ be served and returned against him; but that is given by the statute, for at the common law he shall not have but distress infinite in the same county where the writ was brought, and that is in the county where the land is; and at this day he may choose whether he will sue the process at the common law, distress infinite in the county, or the process which is given by the statute, summons, attachment and the grand distress, which shall have day to answer by such times as two counties may be holden, in which the sheriff shall make proclamation that he come to answer the plaintiff, and if he do not come, and the writ be returned, then he shall be forejudged.* F. N. B. 137. (A).

(M) Mesne. Judgment at what Time.

Br. Damages, pl. 196. cites 13 E. 4. 6.— Br. Mesne, pl. 5. cites 31 H. 4. 52.

[1.] If the defendant in writ of mesne saith not distrained in his default; the plaintiff may have judgment presently for the principal (scilicet) to recover the acquittal. 17 E. 3. 44. adjudged. Contra 30 E. 3. 21. b. adjudged.]

[2. So if he saith not distrained within his fee. 17 E. 3. 44.]

[3. In writ of mesne if defendant acknowledges the acquittal in coparcenary with another, as by conveying the mesnalty to her and her sister; the plaintiff shall not have judgment against her, because the acquittal ought to be by both. 3 H. 6. 43. (for the writ shall abate.) But otherwise it is if partition be between them. 3 H. 6. 43.]

(M. 2) Judgment. How and of what.

• Judgment was that defendant should be distrained of the acquittal, and no judgment that the plaintiff recover the acquittal. Br. Mesne, pl. 15. cites 15 Aff. 9.— + S. P. and yet these are not errors.

1. SEE 14 E. 3. Mesne 7. A. brings a writ of mesne against B. and counts of an acquittance by reason of tenure in frankalmoign, and * judgment was that he should recover damages, and a precept went to the sheriff quod distringeret B. ad acquitand. B. dies; a scire facias goes against C. the heir of B. to have acquittal. C. not acknowledging that he had the seigniorie at the time, or that he had any more &c. pleads, that he hath nothing by descent in fee from his father within the same lands &c. and note, the abbot in the said recovery counted of frankalmoign unde chartam &c. and therein these points were agreed, viz. 1st. That this judgment is well enough to warrant a scire facias for the acquittal. 2d. That no other process of execution lies against the heir than a scire facias &c. 3d. That the plaintiff + need not shew the charter whereby he deraigned the acquittal on the recovery. 4th. When

4th. When an acquittal is granted for one who is not mesne, it is no cause to have a writ of mesne, but only of covenant. 5th. On an acquittal which binds the ancestor by reason of a tenure in frankalmoigne, frank-marriage, or a deed whereby the acquittal is granted, if the heir has the mesnalty, he shall be bound to the acquittal by writ of mesne, ‡ altho' he has nothing by descent in fee-simple from him by whom the acquittal commences; but there it seems he may disclaim in the mesnalty; quære; wherefore the abbot had judgment &c. and affirmed in a writ of error. F. N. B. 136. (U) in the notes there (a) cites 15 Aff. 9. of failure of assets if the acquittance was by deed of his ancestor. Br. Mesne, pl. 15. cites S. C.

Br. Mesne, pl. 15. cites S. C. —
‡ S. P. and the judgment was affirmed notwithstanding [387] these matters; but Brook says quod mirum

2. It seems that where there are two mesnes, one mesne shall not recover damages against the other before execution. F. N. B. 136. (H) in the notes (b) cites 20 E. 3. Mesne 14. and 17 E. 3. 44. and 18 E. 3. 19.

3. In mesne against one as heir of M. his mother, who had bound her and her heirs to the acquittal, the defendant said, that M. after took to baron J. N. to whom the plaintiff had released to him and to his heirs all the acquittal, and that the defendant is son and heir to the said J. N. and M. Judgment &c. and because the plaintiff bound the defendant as heir of his mother, and he pleads a release to his father and his heirs, and so it is another acquittal, and therefore no bar, the plaintiff had judgment to recover the acquittal, and damages taxed by the Court 100s. Br. Mesne, pl. 7. cites 38 E. 3. 10.

4. In scire facias it was said, that if a man confesses the acquittal and suffers the tenant to be distrained in his default, distress shall issue against him; and if he comes and it is found against him, he shall render damages and shall be forejudged; but if he makes default after distraining he shall be forejudged, but without recovery of damages, and this by the statute, as it is said there. Br. Mesne, pl. 3. cites 46 E. 3. 31.

5. In scire facias, it was agreed that a man shall recover damages in writ of mesne, if he be distrained in default of his mesne who ought to acquit him. Br. Mesne, pl. 27. cites 50 E. 3. 23. *Contra in scire facias upon acquittal acknowledged by*
fix. Ibid. — And yet it is agreed that in distress upon the same scire facias a man shall recover damages; quod mirum, and therefore vide librum & tit. Scire Facias in eodem casu. Ibid. — If a man brings a writ of mesne where he is not distrained, the writ is maintainable, but then he shall not recover damages; for the writ is brought only to recover the acquittal &c. F. N. B. 136. (E).

6. Defendant pleaded not distrained in his default, by which the plaintiff prayed judgment of the acquittal, and had judgment to recover it immediately upon this plea; quod nota; and therefore the plea shall not serve but to defend the defendant from damages, as it seems. Br. Mesne, pl. 5. cites 11 H. 4. 52. *S. P. 8 Rep. 134 in Mary Shipley's Case. — He shall have judgment, but no execution for the present.* Hob. 390

7. In writ of mesne against two, and the one appears, and the other makes default, distress with proclamation shall not issue against the other who made default; for the plaintiff cannot recover the acquittal

quittal by the default of the one, where the other appears; and the one shall not answer without the other; per Thirn. and Hanke. But Brook makes a quære thereof; for otherwise it seems when the process is determined against the one, for then if the other be convicted, judgment shall be against both, the one by default, and the other by conviction. Br. Mesne, pl. 21. cites 14 H. 4. 27.

8. In writ of mesne by the tenant, the judgment is no other upon the forejudger, but *that the tenant shall be attendant on the chief lord.* Br. Mesne, pl. 28. cites 10 H. 6. 26.

* Orig. (next
tenus).

9. The tenant shall not recover acquittal against the mesne,* *nor is the mesne bound to acquit him of more services than he pays to the lord; so that if the lord distrains for more services than the mesne ought to do to him, he is not bound to acquit the tenant, but of those which he ought to do to the lord, which the lord of right ought to have; quod nota.* Br. Mesne, pl. 14. cites 28 H. 6. 6.

There are
two several
judgments in
a writ of
[388]
mesne, one
at the com-
mon law,
another by

10. Nota arguendo in dower it was agreed, that if in writ of mesne the defendant *pleads that not distrained in his default, the plaintiff shall recover the acquittal, and for the damages he shall be at issue &c.* and so see that in this action there may be *two judgments; for of the damages shall be other judgment after &c.* Br. Mesne, pl. 17. cites 13 E. 4. 7.

the statute of W. 2. cap. 9. At the common law he shall have judgment to recover his acquittal, and if he be distrained or damaged his *damages and costs.* Co. Litt. 100.

11. If the *mesne has paid the services* to the lord paramount, and the *tenant be afterwards distrained for those services*, he shall have a writ of mesne; but it is a question, whether he shall recover *damages* in this writ. But it seems, he shall, because the mesne shall recover damages against the lord, if he will put his cattle into the pound for the tenant, and sue a replevin &c. And yet not distrain'd in his default is a good plea in writ of mesne; and if he pays the services, he is not distrain'd in his default. F. N. B. 136. (H).

See (A. 2)
S. 16, 17,
18; 19. 23.
and in 10. 18
there.

(N) Forejudger, in what Cases, and the Effect thereof, and Judgment how.

1. SEE in the ancient tenures, tit. Frank-marriage, that *tenant in tail* shall have writ of mesne, but not process of forejudger, unless it be in advantage of his issue; quod nota. Br. Mesne, pl. 32.

2. The judgment by the statute of W. 2. is a *forejudger* of the mesnalty, and that in two several cases; one upon process given by the said statute, viz. *summons, attachment, and grand distress, and if he cometh not, and the writ be returned, he shall be forejudged; the other case is, where a tenant recovereth his acquittal in a writ of mesne, if he be not acquitted afterwards, he shall have a writ of distringas ad acquietandum against the same mesne,*

*mesne, and if he cometh not, he shall be forejudged by his default of the mesnalty; and so if he cometh, and it be found against him by verdict, he shall be forejudged: but forejudger in that case is not given against his heir, for that the statute speaketh only of the mesne, amittat servitia de A. (le tenant) de tenementis prædictis, & quod omisso prædicto T. præfat. R. (le seignior paramount) modo sit attendens & respondens per eadem servitia per quæ T. tenuit. The said statute in case of forejudgment doth not bind a * feme covert; and yet if such judgment be given against a baron and feme, it is not void, but erroneous, and to be reversed in a writ of error; and so forejudgment against a tenant in tail shall bind the issue in tail in an avowry, until he reverseth it by error. If two jointenants bring a writ of mesne, and the one is summoned and severed, the other cannot forejudge the mesne; for he ought to be attendant to the lord paramount, as the mesne was, and that he cannot be alone. And so it is if there be two jointenants mesnes, and in a writ of mesne brought against them, one maketh default, and the other appears, there can be no forejudger. Co. Litt. 100.*

* Forejudger against baron and feme covert is not void, but error; for the feme shall not have cui in vita. Br. Mesne, pl. 33. cites 10 E. 2. and Old Nat. Brev.

3. No forejudgment can be but when there is but one mesne between the lord distraining and the tenant, because the tenant upon the forejudgment cannot be attendant to the lord distraining, in respect there is mesne between them, and so the said statute provideth for it in expresse terms. Co. Litt. 100. b.

4. Where there was lord, mesne and tenant, and the mesne was arrear, and the lord distrained the tenant, and the tenant had offered the rent, the lord might have refused; and for this reason process of forejudger was given; quod nota. Br. Avowry, pl. 6. cites 2 H. 6. 1.

5. In forejudger, the judgment is no other than that the mesne shall be forejudged, and that the tenant shall be attendant capitali domino. F. N. B. 136. (F) in the notes (d) cites 10 H. 6. 26. Per Strange.

Br. Mesne, pl. 28. cites S. C.

6. If there be lord mesne and tenant, and the tenant holdeth of the mesne by fealty, and 3s. rent, and the mesne takes a wife, and the tenant brings a writ of mesne against the mesne, and forejudges him, and the mesne dies, the wife of the mesne shall have dower of the rent by which the tenant held, and shall not be attendant unto the tenant. Perk. S. 432.

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7. If there be lord, mesne and tenant, and the mesne holds by priority, and the tenant in a writ of mesne doth forejudge the mesne; in this case the mesnalty is extinct, and the tenant shall be answerable to the lord de eisdem servitiis & consuetudinibus quæ prius facere debuit prædictus medius; and in this case the tenant shall hold by priority; for 1st. he shall hold per antiquius feoffamentum; 2d. the mesne in supposition of law was said to hold the land; 3d. the statute of W. 2. that gives the forejudger, provideth that he shall hold by the same services and customs, and in such sort, as it may be done sine præjudicio alterius, and this should be to the prejudice of the lord by priority, if he should lose that benefit. 2 Inst. 392.

(O) Lord, Mesne and Tenant. *Actions by one against the other. In what Cases there must be a Joinder,*

Br. Mesne.
pl. 12. cites
S. C.

1. **I**N replevin H. P. avow'd, because G. W. held of him two manors by fealty and four marks rent, of which services &c. and that the manors are of the value for 280l. and for 14l. for aid to make his eldest son a knight, who is above 15 years, he avow'd upon G. W. as upon his very tenant; and well, tho' he had not writ to levy it; for he may levy it by distress; and the plaintiff who was tertenant, and held of G. W. and G. W. over of H. P. the avowant &c. pleaded release made by the lord to the mesne of all services, actions, and demands, except fealty and four marks rent; judgment if he may avow for aid. And it was held, that the plaintiff cannot plead the plea; for he is a stranger to the release, and a stranger to the avowry; and that he cannot plead any plea but hors de son fee, or a thing which tantamounts; nor can he plead riens arrear; but ought to have required the mesne to have joined with him in answer. And they two might have joined in this plea, and if he would not, then the tenant might have had writ of mesne against him, and recovered damages; for to this effect is the joinder of the mesne to plead such plea as the tenant cannot plead; and afterwards the mesne made his attorney to join to the plaintiff; quod nota bene. Br. Avowry, pl. 75. cites 39 E. 3. 34.

2. If lord mesne and tenant are, and the lord distrains, the plaintiff brings replevin, and the lord avows upon the mesne, who joins to the tenant gratis, this is well; for summons ad auxilium does not lie; for it is upon fee simple. Br. Joinder in Action, pl. 64. cites 7 E. 4. 19.

3. Replevin by T. against K. who made consueance as bailiff of C. by tenure of nine houses by certain services &c. held of C. his master by M. and avowed upon M. who was a mesne, upon which came this same mesne and said that the plaintiff held one of the said houses of him by 20s. and so he is mesne between them, and prayed that he might be admitted to join with the plaintiff; and the best opinion was, that he may join to discharge him in writ of mesne, tho' the plaintiff did not pray it, and tho' they did not agree in the quantity of the nine houses, and tho' he did not shew mesnalty to be of the whole; for per Littleton, there is mesnalty for this parcel. But Brian J. contra. And per Jenny, the joinder is good to plead to the avowry, or in abatement &c. Br. Joinder in Action, pl. 69. cites 12 E. 4. 16.

4. The joinder is not only to disclaim, but is to plead such pleas in bar, and in abatement of the avowry, as the plaintiff who is a stranger cannot plead. Ibid.

5. It was agreed, that if there are *lord mesne and two tenants* and one of the tenants brings replevin; and the lord avows upon the mesne, the other ought to join to the plaintiff, so that the mesne may join to them two; for he cannot join to the one alone. Br. Joinder in Action, pl. 67. cites 21 E. 4. 2.

So if there be lord, two mesnes, and a tenant, and the lord avows upon the mesne paramount,

he with all the mesnes paravail ought to join for mischief of the tenant; for otherwise the mesne paramount alone cannot join to the tenant alone; for there is no privity between them. Ibid.

(P) Replications.

1. **I**N mesne the plaintiff counted how he held of the defendant, and is distrained in his default, and the defendant said that the mesnalty descended to her and to one M. as to two sisters and one heir who is in full life, judgment of the writ; and a good plea by the opinion of the Court; for he ought to have the action against both; by which the plaintiff shewed how partition was made between the defendant and her sister, and this mesnalty allotted to the defendant &c. and a good replication. Br. Replication, pl. 2. cites 3 H. 6. 42.

(Q) Lord, Mesne and Tenant. *Inter se. Where the one purchases of the other.*

1. **W**HERE there is lord, mesne, and tenant, and the lord distrains for service of the mesne, the tenant in assise may plead *riens arrear*; contra to the avowry in replevin; quod quare of Riens Arrear in Assise; for it is not clear there. Br. Avowry, pl. 85. cites 27 Aff. 51.

2. In a writ of mesne, if the defendant acknowledges the acquittal, the plaintiff may distrain him for not acquitting him. Br. Fines, pl. 45. cites 38 E. 3. 33.

3. Lord, mesne, and tenant; the lord distrains the tenant, the mesne may put his beasts in the pound for them and bring replevin, which shall be general; for there is no other form of the writ as it is said elsewhere; and if the defendant says that he did not take, or that the property was in a stranger and not in the plaintiff, then the plaintiff may shew the special matter by replication and maintain the writ. Br. General Brief, pl. 18. cites 7 H. 4. 18.

4. If twenty mesnes are between the tenant and the lord paramount, yet the mesne next paramount holds the land of the lord paramount by rent; per Hill. Br. Intrusion, pl. 8. cites 11 H. 4. 82.

5. If lord, mesne, and tenant be, and tenant holds of the mesne by 10s. and the mesne holds by 1d. now if the lord paramount purchases the tenancy, the mesne shall have the overplus of the rent as a rent-seck, and may distrain for it; because the rent was *rent-service* before, and the nature of the rent is not changed by the act of the mesne. Kelw. 104. pl. 11. Casus incerti temporis.

3 Le. 261.
Anon. S.P.
32 Eliz. in
the Court of
Wards.

(R) How

(R) *How the Mesne shall be said to hold. By Common Law or Custom.*

* And shall not be intended of the nature of the land, unless it be specially shewn; quod nota. Br. Customs, pl. 24. cites M. 3 E. 3. but it should be M. 30 E. 3. according to Br. Rents, pl. 6.

1. **W**HERE there is lord, mesne, and tenant in gravelkind, the rent and services of the mesne * may be held at common law, unless it be specially shewn that the rent is of the nature of the land; quod nota, and quære. Br. Rents, pl. 6. cites M. 30. E. 3.

See (A. 2) S. 8, 9. & in notis. Co. Litt. 152. b.

(S) *Extinguishment of Mesnalty.*

1. **I**F there be lord, mesne, and tenant, and the mesne grants the mesnalty to one for term of life, and after the lord releases to the tenant of the land all the right which he has in the land, there the mesnalty is extinct; for the services which the mesne has shall be in respect of the services which he does over to the chief lord; yet the tenant for life shall have the services for his life; quære inde; and so see release between the lord and the tenant extinguishes the mesnalty; but it seems, that if there be any surplus he shall have it. Per. Babb. Ch. J. Br. Releases, pl. 20. cites 8 H. 6. 24.

2. If there be lord, mesne, and tenant, and the mesne is attainted of felony, the lord paramount shall have the mesnalty presently. 2 Inst. 37.

3. The King, lord, mesne in capite, and tenant paravail in socage; the mesne granted the mesnalty to the use of himself for life, remainder to the use of tenant paravail in tail. The question was, if the mesnalty be suspended during the life of the mesne by force of this remainder in tail? Resolved, that a remainder in tail, or for life expectant upon estate for life, or in tail, will never suspend a mesnalty, seignior, rent &c. for tho' the remainder vests immediately, yet this cannot suspend the present franktenement of the rent during the life of the first tenant for life; because the tenant for life is tenant to the lord, or to him in reversion, so long as he lives, and he shall do the services, and the avowry shall be made upon him; for he is the very tenant by the manner, and during his life the heir of him in remainder in tail shall not be in ward; and as seignior, rent &c. * cannot be suspended in part, and in esse for part in respect of the land out of which it is issuing, so cannot seignior, rent &c. be suspended in remainder and in esse for a particular part in possession; for then would ensue fractions of estates, and particular estates would be created without donors or lessors against the maxims of law. 9 Rep. 134. Mich. 9 Jac. in the Court of Wards. Ascough's Case.

* This point was denied by the Court. Vent. 277. Mich. 27 Car. 2. B. R. in Case of Hodgkins v. Robson & Thornborough.

4. But if the mesne grants his mesnalty to one for life or in tail, the

the remainder to tenant paravail in fee, there the mesnalty is extinct; because he has as high an estate in the inheritance of the mesnalty as he had in the tenancy, and there is no possibility of reviving the mesnalty; and in the same case the mesnalty is not extinct for the inheritance and in esse for the particular estate for life or in tail in possession, but by the remainder in fee is extinct in toto; for otherwise there would be this absurdity, viz. that there would be a fee simple of the tenancy paravail, and also a fee simple of the seigniorie paramount, and an estate for life only, or in tail of the mesnalty, and so a tenancy in fee simple should be held of a mesnalty for life, or in tail only, and a seigniorie in fee should be issuing out of a mesnalty for life or in tail only, which is impossible and cannot any ways be. 9 Rep. 134. b. 135. a. in *Ascough's Case*, and cites 3 H. 6. 1. and 15 E. 4. 12.

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5. If the tenant infeoff the lord paramount and his wife and their heirs, this is only a suspension of the mesnalty; for if the wife survives, both mesnalty and seigniorie are reviv'd. Co. Litt. 152. b.

Mesne Profits.

(A) *Who shall have them; being claimed by several.*

1. **L**ANDS are extended on a statute staple, yet the conusee is not in possession before he has received them; for he may pray that they be delivered to the appraisors, according to the statute of *Action Burnell*. The question is, who shall have the rent, whether the Conusor, the Conusee, or the Queen? The writ is *Cape in manum nostram*, so that the lands are in the Queen's hands. This is like to the case of *disceit*, where he shall not have the mesne issues; so as it seemed to the Court that the conusee should not have them, but they did not say expressly who should have them. Goldsb. 108. pl. 14. Mich. 30 & 31 Eliz. Anon.

2. In case of a fee simple, where the uncle enters before the birth of a child, that after-born child is not intitled to the mesne profits. Arg. 10 Mod. 414. Trin. 4 Geo. 1. B. R.

3. In case of a divorce in the Spiritual Court a *vinculo matrimonii*, the husband is not answerable for the mesne profits of his wife's estate. Arg. 10 Mod. 414.

(B) *From*

(B) From what Time.

1. *N. and A. his feme seised in fee leased to W. for 17 years and to his heirs, and W. died within the term, and P. his heir entered, and levied a fine to M. and retook to him and K. his feme in fee, and P. died; then N. died; and A. durst not approach in the life of P. and now she offered to enter, and K. disturbed her, and she brought assise against K. and recovered damages from the time of the disturbance, and not before; for K. was covert, and was not a disseisor till the disturbance, for before that P. was a disseisor only.* Br. Damages, pl. 95, cites 11 Aff. 21.

So it seems where the demandant recovers the land against the baron and feme by judgment before the disagreement of the baron; for if the demandant enters before the disagreement, there

2. *In debt; per Catisby, if I enfeoff a feme covert, and after the baron disagrees, the feoffment is void; per Brian, I agree to it, for the feoffment was never good without the agreement of the baron; quære of this opinion, for Brooke says it seems to him to be good till the baron disagrees, and quære, what relation the disagreement shall have? for it seems that the profits taken mesne between the disagreement and the livery shall not be rendered to the feoffor; and quære if a praeipe quod reddat had been brought against the baron and feme after the livery, and after the baron disagreed pending the writ, it seems clearly that the writ shall abate, and yet the mesne profits may be justified; for this is executed.* Br. Feoffment de terre, pl. 36, cites 1 H. 7. 16.

it is executed also; quod nota. Br. Feoffment de terre, pl. 36, cites 1 H. 7. 16.

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3. *Inrolment cannot relate to the mesne profits; per Manwood Ch. B. Lane 65. Trin. 7 Jac. Sir Edward Dimock's Case.*

So from the time of the right accrued; tho' a

4. *Relief was for mesne profits since the time of the bill.* Chan. Rep. 48. 16 Car. 1. Dean v. Wade.

a long time since, and tho' omitted in a former decree. 3 Chan. Rep. 259. 34 Car. 2. Coventry v. Hall, ala. Frederick v. Thynn.

5. Note, if one recovers and has judgment in ejectment according to the usual practice by confessing lease entry and ouster &c. it was made a doubt by the Court if upon such confession lessee may have trespass for the mesne profits from the time of the entry confessed; for it seems that it is estoppel between the parties to say that he did not enter; tamen quære; because this confession is taken to be to a special purpose only. Sid. 210. pl. 7. Trin. 16 Car. 2. B. R. Anon.

6. A. being possessed of a term only as a trustee, entered as in his own right, and being disturbed brought ejectment and got judgment, whereupon the cestui que trust brought a bill to be relieved; A. denied the trust, but it was decreed against him, and that the judgment in ejectment, or any other judgment obtained in an action for mesne profits (if any such there was) should be vacated in the record thereof; but the defendant A. not to give the

the plaintiff any account of the profits received out of the premises, unless he refuse to deliver up the possession, nor then neither, but only for the profits received after such refusal. Fin. R. 373. Trin. 30 Car. 2. Hodgkinson v. Moor.

7. The recovery of the mesne profits is from the time of the action brought; and * without an *actual entry*, there can be no recovery of the profits; per Cur. 6 Mod. 222. Mich. 3 Ann. B. R. Anon.

* Br. Tresp. pl. 187. cites 9 E. 4. 39. that trespass lies for the

mesne profits, tho' the disseisee did not enter; but that in pleading he must allege re-entry but it shall not be traversed &c. quod nemo negavit.

8. On appeal from the Rolls the question was, if the plaintiff was intitled to relief for mesne profits received by the defendant whilst a cause was pending in this Court, and the defendants had an *injunction*? Per Ld. Wright, he is not intitled but from the time of *his entry*; if the plaintiff entered he might recover at law; the injunction did not prevent an entry; and dismissed the bill. 2 Vern. 519. Mich. 1705. Tilly and Ux. v. Bridger.

9. In case of a *breach of a condition subsequent* to the vesting of the estate in the defendants Lord Harcourt decreed a re-conveyance and an account of the rents and profits *only from the time of the non-performance*, or refusal. Ch. Prec. 387. Pasch. 1714. Hunt v. Hunt.

G. Equ. R. 43. S. C.

10. Where *no entry* is made in the life of the *pernour* by the person intitled to the mesne profits, equity will not *relieve* for them unless in case of a *trust*, or an *infant*; per Ld. Cowper. 2 Vern. 724. Mich. 1716. Hutton v. Simpson.

Cestui que vie dies; the tenant continues possession, neither he

nor the lessor knowing that the lease was determined; per Lord Macclesfield, where one has title of entry and *neglects to enter*, but sleeps upon it for several years, as he has no remedy in law so neither has he in equity, because of his own negligence, and this Court will not make the tenant in possession so holding over to be but a bailiff or steward, whether he will or not; but in the principal case there *having been 2 daughters of the same name*, and so, tho' the nominee had been dead long before, yet the other of the same name being living, by which the lessor's mistake was occasioned, and therefore he decreed an account for the mesne profits from the expiration of the lease; and so it would be where any *fraud to conceal the title from the lessor* had been used, or in case of an *infant*; but otherwise generally where the party *has no remedy at law* he shall have no relief in equity for the mesne profits but *from the time of the entry made*. Ch. Prec. 516. Pasch. 1719. Duke of Bolton v. Deane.

* If A. enters on the lands of B. an infant, B. when of age shall by bill in equity recover the profits from the time of the first entry; because where one enters upon an infant he is chargeable as bailiff or guardian, and no laches shall be imputed to the infant; and therefore it will be construed as if B. entered as soon as his right accrued: admitted, Arg. 2 Wms's Rep. (645.) Mich. 1731. in Case of Bennet v. Whitehead.

11. A. having a term for years granted to him of lands devised the same to C. his younger son and died; C. entered on part of the lands, and the other part was in the possession of J. S. who pretended it was his inheritance; C. brought his bill against J. S. for the mesne profits of that part of the premises in his possession, and it *appearing that the defendant had concealed a counter-part of a lease of the same lands executed by himself, and which made out the plaintiff's title*, Lord C. King decreed the defendant to account for the rents and profits from the time of the testator, at which time C's title accrued. 2 Wms's Rep. (644.) Mich. 1731. Bennet v. Whitehead.

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See Trespas
(K) pl. 3.
4. 5.

(C) Action for them. Who shall have Action,
and at what Time ; after the Estate determined.

S. C. cited
per Coke. 1
Roll. R. 61.
in Case of
Grange v.
Howlett.

1. *WHERE judgment is reversed by error &c. he who reversed the judgment shall not have action for the mesne profits, nor for the mesne occupation.* Br. Relation, pl. 44. cites 4 H. 7. 10. per Keble.

2. If incumbent be removed in *quare impedit*, the plaintiff shall not have the mesne profits ; per Coke. Roll. R. 61. Mich. 12 Jac. B. R. Grange v. Howlett.

3. *Tenant pur autre vie* is disseised ; if *cestuy que vie dies*, he shall have trespas for the mesne profits, because he cannot enter by the act of God, Arg. Roll. R. 147. Hill. 12 Jac. B. R.—Otherwise he must enter before he can bring his action ; per Coke Ch. J. 3 Buls. 25.

See Eject-
ment.

4. 16 & 17 Car. 2. cap. 8. s. 3, 4. *Execution shall not be stayed by writ of error upon any judgment after verdict in dower, ejectione firme, unless the plaintiff in such writ become bound to the defendant in such a sum as the Court to whom the writ is directed shall think fit, that if the judgment be affirmed, or the writ discontinued in his default, or he be nonsuit, he will pay such damages and sums of money (to ascertain which a writ of inquiry shall issue to inquire of the mesne profits and damages by waste done after the first judgment) as shall be awarded and costs of suit.*

5. Where there is a recovery in ejectment and an action for the mesne profits is brought in the name of the plaintiff in the ejectment ; there the plaintiff needs in this case only to give the recovery in the ejectment in evidence, and to prove the lands to be the same lands recovered ; but if the action of trespas for the mesne profits be brought in the lessor's name (as it may be), there the defendant may give his title in evidence, if he have any, and put the plaintiff to try the matter over again. 2 L. P. R. 600, 601.

6. An ejectment as it is in common practice, is but a feigned action, to which the lessor of the plaintiff who is the principal person is not a party, and therefore he cannot maintain an action for the mesne profits, without an actual entry, but the lessee may. Per Cur. Skin. 424. Pasch. 6 W. & M. B. R. Andrew Newport's Case.

7. *Trespas* will lie for mesne profits after recovery in ejectment, tho' writ of error is pending. 12 Mod. 138. Mich. 9 W. 3. Donford v. Ellys.

(D) What Action lies for them.

1. **I**N assise it was found that the plaintiff within age was seised and disseised and came to the land and put in his foot, but took no profit, and the other ousted him, and yet he shall recover damages from

from the first disseisin; and therefore it seems that he was not remitted by his entry; for then he ought to recover his *first damages in trespass*. Br. Damages, pl. 159. cites 26 Aff. 42.

2. 11 H. 6. cap. 3. *As well other actions as an assise shall be* [395] *maintainable against pernor of the profits.*

3. *Account* lies not against *abator* or *intruder*; because they pretend to be owners; per Dyer. Ow. 84. Mich. 14 & 15 Eliz. in Case of Tottenham v. Beddingfield.

4. Upon a *recovery* of lands in an action of trespass and *ejectment*, the plaintiff may afterwards bring an action of trespass against the defendant for the mesne profits of the land: so it was held in the case of WILMOT v. HOLDEN. Trin. 1652. B. S. The *mesne profits* are such profits of the land as did grow due betwixt the time of the demise laid in the declaration, and the time of the recovery, but more he shall not recover; for if he be more damnified, it was his own fault that he brought his action no sooner. 2 L. P. R. 596.

• (E) *What other Remedy* may be had for them, and how. And what must be done to intitle the Party.

1. [T was held, that where a man would recover the mesne profits in an action of *trespass*, he must *prove entry into every parcel*, and not into one part in the name of all. Clayt. 35. 11 Car. Gledel's Case.

2. If a man is put to *election to proceed at law or in equity*, if the bill be for land, and to have an *account* of the mesne profits, he may elect to proceed in an *ejectment at law for the possession*, and *in equity on the account*. Because at law he can recover damages for the mesne profits, from the time only of the *entry laid in the declaration*. Vern. 105. Mich. 1682. Anon.

When one has title to the possession of lands and enters, whereby he becomes intitled to recover da-

gages at law for the time the possession was detained from him, after such entry he shall not turn that action at law into a suit in equity, and bring a *bill for an account of the profits*, except in case of an *infant* or some other very particular circumstances; per Ld. Wright Ch. Prec. 252. Pasch. 1705. Tilly v. Bridges.

3. *After a decree for enjoyment* it is proper to exhibit a *bill* for the mesne profits. 2 Ch. Cases. 72. Mich. 33 Car. 2. Coventry v. Thinne.—Ibid. 134. Hill. 34 & 35 Car. 2. Coventry v. Hall.

4. An *infant* brought a *bill* against an *intruder* for an account of profits. The Ld. Keeper North observed, that Littleton says, if a man intrudes upon an infant, he shall receive the profits but as guardian, and the infant shall have an *account against him* in this Court, *as against a guardian*; but to that it was answered, that in this case a *verdict* had passed against the infant; and that *binds his right* as to an account of profits, and that the *possession was recovered in the life-time of the infant's father*; and in such case *latches* would run upon an infant; and besides the plaintiff was

was not proper for an account here, until he had first recovered at law. But the Court retained the bill and directed there should be a trial in ejectment at the King's Bench bar next Term. Hill. 1684. 1 Vern. 295, 296. E. of Newburgh v. Bickerstaffe.

5. Motion to set aside a verdict recovered in an action for the mesne profits after a *recovery in ejectment* shewing that the defendant in the ejectment had brought another ejectment since and recover'd, so that the first recovery was *disaffirmed*, and therefore there ought to have been no recovery for the mesne profits. But the motion was denied by the whole Court. 2 Vent. 72. Mich. 1 W. & M. C. B. Anon.

6. A delivery of a *declaration in ejectment* is a sufficient *entry for recovery* of mesne profits, because the party is estopped by the verdict, but it is not an eviction in law, so as to be given in evidence to bar a demand for rent. Cumb. 453. Trin. 9 W. 3. B. R. Bell v. Clarke.

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* Br. Trespass, pl. 187. cites 9 E. 4. 39. that trespass lies

for the mesne profits, tho' the disseisee did not enter. But that in pleading he must allege re-entry, but it shall not be traversed &c. quod nemo negavit.

7. The *recovery* of the mesne profits is from the time of the action brought; and * without an *actual entry*, there can be no recovery of the profits; per Cur. 6 Mod. 222. Mich. 3 Ann. B. R. Anon.

8. On a judgment in *ejectment against the tenant in possession* the plaintiff will have his costs, and be intitled to an action, to recover the value of the mesne profits in damages, which he can never recover by a judgment against the casual ejector. Arg. 8 Mod. 118. Hill. 9 Geo. Smith v. Jones.

(F) Account for them. Who shall have it.

1. **I** F I am *disseised* of a manor, and my tenants pay their rent to the disseisor, and after I *re-enter*, I shall not have the rent again of my tenants which they paid to my disseisor, but the disseisor shall answer for all in trespass or assise &c. per Brian Ch. J. Kelw. 2. 12 H. 7.

2. *Devisee entered* and held the land for 20 years, and afterwards the *devise* was *adjudged void*. He to whom the land descended brought action of account against the devisee but adjudged that the action did not lie; per Manwood J. 3. Lc. 24. Mich. 15 Eliz. C. B. cites it as the Case of Monox.—Ow. 84. S. C. cited per Manwood.

3. If an *attainder* be reversed by act of parliament, the *patenter* shall not answer for mesne profits; otherwise if *reversed* by writ of error; per Holt Ch. J. Cumb. 424. cites 3 H. 7.—S. P. per Twissden J. Vent. 176.

(G) Account. Where the Heir shall account for them.

1. **O**NE co-heir entring and avoiding the tenant's lease shall answer the moiety of the profits to the other co-heir. Chan. Rep. 49. 16 Car. 1. Drury v. Drury.

2. A. made a lease for years of a house, and then convey'd it to J. S. and dies. J. S. being beyond sea, the conveyance was burnt in the fire of London, and thereupon the heir of A. enters and receives the rents. But the deed of settlement being found by verdict, the heir during the lease was only as a bailiff and receiver, and decreed to account. Fin. R. 285. Hill. 29 Car. 2. Lister v. Lister.

3. A defective conveyance made to a younger child without any consideration of money, and not in pursuance of any marriage agreement, or for any valuable consideration, was decreed to be made good, and that the heir shall answer the mesne profits taken by him. 2 Chan. Cases 134. Hill. 34 & 35 Car. 2. Coventry v. Hall.

4. Where an heir at law was disinherited upon a nice construction of the words, by which an estate tail was limited to his mother, but she dying in the life of testator her heir could not take, tho' the testator fully intended he should Ld. Cowper would not decree him to account for the rents and profits, there being no infant in the case, but left the plaintiff to his remedy at law by entry and ejectment. Ch. Prec. 453. Mich. 1716. Symphon v. Hornsby.

(H) What Things shall be recovered as, or in lieu [397]
of the Mesne Profits. See Emble-
ments.

1. **I**F disseisee re-enters into the manor, he shall have the ward which happened in the time of the disseisor, and presentment of a church in like manner. Br. Chattels, pl. 8. cites 2 H. 7. 1, 2. Br. Emble-
ments, pl.
17. cites
S. C.

2. Where an order was made, and that J. S. should have the mesne profits and issues of such lands, the same is not to be intended that the party shall have the crop growing by the manurance of another, but the value of the land as it might be leased. And so it is where the sheriff returns issues &c. for the corn there growing may be of the value of 40l. where the land is but of the value of 10l. 3 Le. 174. Mich. 29 Eliz. Blunt v. Ward.

See Damages
(G)—Error
(K).

(I) *Recoverable against whom, and in what Cases.*

1. **I**F a *feme covert* be *enfeoffed* of land her husband being beyond the sea, and he returns, and will not suffer his wife to take the profits of the land, nor to continue seisin of the same land, but causeth her utterly to relinquish and refuse the seisin and occupation of the land, and he himself utterly refuses to occupy the land, now by this means he shall discharge himself the damages from the time that his wife and he did refuse the occupation of the land in a writ of entry in the Per brought against him and his wife, in case the feoffor of his wife was a disseisor. But for the time that his wife did occupy the land, he shall answer damages; *tamen quære &c.* Perk. l. 44.

2. Where land is lost by a *scire facias* without warning the tenant, he shall be restored to the land and the mesne profits. Jenk. 122. pl. 45.

3. If extent be avoided by *audita querela*, the conusee must account for mesne profits; per Holt, 12 Mod. 358. Mich. 13 W. 3. in Case of Pullen v. Purbeck.

4. If one tenant in common brings *ejectment* against the other, there can no mesne profits be recovered. 12 Mod. 657. Hill. 13 W. 3. in Case of Johnson v. Allen.

(K) *Pleadings.* And what Evidence must be given in Actions for them.

1. **I**N pleading, a *re-entry* must be alleged, but it shall not be traversed. Br. Trespas, pl. 187. cites 9 E. 4. 39.

2. Per Cur. after a recovery in *ejectment*, if an action of trespass be brought for the mesne profits before the lease, nothing shall be given in evidence but the value of the profits, and not the title; for otherwise long trials would be infinite; and if betwixt the same parties, or against undertenants the record is an *estoppel*; but quære (says the reporter) if the defendant be one who hath a title, whether he may not give that in evidence. Sid. 239. Hill. 16 & 17 Car. 2. B. R. Collingwood and Ramsey v. Several Defendants.

[For more of Mesne Profits, see Damages, Ejectment, and other proper Titles.]

Metes and Bounds.

(A) What may be done by Metes and Bounds.

1. A Court of *Frankpledge* cannot be divided by metes and bounds. Arg. Sti. 101. Pasch. 24 Car. B. R. in the Case of *Thin v. Thin*.—cites Co. Litt. 32.—Nor a *Hundred*, ut ante.
2. *Dower* is assignable, either by metes and bounds, or in common, or in special manner. Arg. Sti. 101. in Case of *Thin v. Thin*.—cites Lib. Intrat. 18.

[For more of Metes and Bounds, see Dower, Forest, (I) and other proper Titles.]

Mill.

(A) Customs to Grind at Mills. Extend to whom and what.

1. *SECTA molendini* lies most properly where a man holds by fealty and suit to his mill and he will not do the suit; or he may distrain for the suit. Br. Nufance, pl. 12. cites 22 H. 6. 14. per Newton. And where the tenants of D. have used by prescription to grind at my mill of D. secta molendini lies. Ibid. per Newton.—But per Paston, peradventure secta molendini does not lie; but where there is a tenure; and they shall not be bound to grind other corn there, but that which grows upon the same land, which is held by this tenure. Ibid.—See Custom (C) pl. 3, 4.
2. Tenants hold of A. as of his manor by fealty, and suit to the lord's mill; the lord aliens the mill with the suit of the tenants to B.—A. dies, and his son enters, and supposing that his tenants who held of his manor could not do suit to him that had not the manor erected a new mill elsewhere on his demesnes, and had the

suit to his own mill which B. used to have; for none can have suit to his mill by reason of a tenure, unless of corn growing in certain land, and that within his seignior. 4 Rep. 88. b. Pasch. 43 Eliz. B. R. in Luttrell's Case.

3. In an action on the case for erecting a mill the lord declared upon a *custom for all the inhabitants to grind at his mill*, and that defendant had built a mill there contrary to the custom; adjudged a good custom, and well pleaded; and suit to a mill may be by reason of *tenure* or service, and also by custom, and so may well bind strangers. 2 Buls. 195. Hill. 11 Jac. Hix. v. Gardiner.

To compel
all the tenants within
the King's manor to
grind at the

4. A new erected house is within the custom of multure, and that none may grind elsewhere but in case of *excessive toll*, or that the grist cannot be *ground in convenient time*. Cited Hard. 177. as the Case of Seintley v. Bendell. 3 Car.

King's mill is a personal prerogative of the King's, which no other lord can have but by *tenure*, custom or prescription. But it will extend to a *fee farmer*, because it is for the King's advantage Hill. 12 & 13 Car. 2. Hard. 177. White and Snook v. Potter.

[399] 5. An abbot had a mill within the King's manor, at which mill all the inhabitants were bound by custom to grind their corn &c. The King granted the manor over, and the mill came afterwards to the Crown by the dissolution of the abbey, and the King granted it inter alia in fee farm; and the tenants and inhabitants were decreed to grind there as if it were a *prerogative mill* and appertaining to the King's manor, at which of common right all the tenants of the manor ought to grind their corn, and by custom all the inhabitants. And this was decreed on view of diverse precedents; but none of the precedents were in point, to wit, of a *mill in gross*, which never was appertaining to the King's manor, or originally in the King. Mich. 1655, Hard. 21. Currier v. Cryer.

(B) Who may erect a Mill. And where.

1. A Lord of a manor had 4 mills, and declared that all the tenants of the plaintiff within the same town, and all the tenants there &c. ought, and time out of mind &c. had used to grind at the said mills of the plaintiff, and that defendant, one of the tenants of the plaintiff, had erected and set up an *horse mill* within the said town, and there the tenants grinded. It was held, that peradventure upon such matter an action lies; because the defendant, being one of the tenants of the plaintiff, is bound by the custom and prescription, so as he has offended against the privacy of the custom and prescription. 1 Le. 273. in Case of Russel v. Hansard. Cites 22 H. 6. pag. 14. pl. 23.

Hard. 178.
Hill. 12 &
13 Car. 2.

2. A manor was held of the King in fee farm, and it was the custom for the tenants to grind at the lord's mill, and not elsewhere; in this case any tenant may set up a mill on his own ground out of the manor, but not within the manor; but if the

owner

owner or tenant of such a mill out of the manor cause or persuade any of the tenants or residents within the manor to grind there, or *fetch any grist out of the manor to his own mill*, in that case he may be *prohibited* by a decree of the Exchequer; but they cannot decree any mill to be *destroyed*, unless erected *within the King's manor to the prejudice of the King's mill*. Mich. 12 Car. 2. Hard. 175. Green v. Robinson and Wood.

3. A mill was newly erected *near to a manor of the King's, in which were mills*; the Court would not decree it to be *demolished*; and they doubted if a mill not within the King's manor might be demolished where there is *no tenure or custom*, whereby the inhabitants are obliged *to grind at the King's mill*. Hard. 184. Pasch. 13 Car. 2. The Mayor of Scarborough v. Skelton. But decreed not to take away any grist from the other mill, but demolishing can be decreed only in the King's Case, or that of his patentee. Hard. 178. Hill. 12 & 13 Car. 2. White & Snook v. Potter.

4. One had an ancient mill which had a water-course to it: the *water-course is diverted*; the tenant *builds a new mill following the stream in the same tenement*, and well enough. Arg. 2 Show. 141. Mich. 32 Car. 2. B. R. cites Daniel v. Clerk.

(C) Actions. Diverting the Water-course.

1. If one erects a *new mill* on his freehold, and another *diverts the water-course* from this mill, tho' it passes by his land, yet if the water used to follow this course, action on the case lies against him; for he cannot use his land, or the water that passes by his land to the damage of another; and they say that has been several times so adjudged. Palm. 290. Trin. 20 Jac. B. R. The Earl of Rutland v. Bowler. In case of diverting a water-course the plaintiff [400] ought to prove his mill to be an ancient mill, or else he may be nonsuit. Per Holt Ch. J. Carth. 85. in Case of Heblethwait v. Palma.

2. If a man has a *water-course* running thro' his ground, and erects a mill upon it, he may bring his action for diverting the stream, and not say antiquum molendinum; and on the evidence it will appear, whether the defendant has ground thro' which the stream runs before the plaintiff's, and that he used to turn the stream as he saw cause; for otherwise he cannot *justify though the mill be newly erected*. Per Hale. Vent. 237. Hill. 24 & 25 Car. 2. B. R. in Case of Cox v. Matthews.

3. A. hath two acres of land, to which an ancient water runneth, which he prescribes to have *pro usu & commodo* generally sixty years before he had a mill upon his land, and he *builds a new mill 6 yards lower* than where the ancient mill stood; B. hath an ancient dam upon the same stream which he pulls down, whereby great part of the stream running to the mill of A. is diverted; it seems that A. may maintain an action upon this case. Skin. 65. 175. Mich. 34. and Pasch. 36 Car. 2. B. R. Palms and Heblethwait.

(D) Actions for other Matters relating to Mills.

1. **I** F I have a mill, and another *erect another mill*, by which I lose my custom, no action lies, unless he *disturb the water*. Hutt. 100. cites 11 H. 4. 27.
2. If a mill be *set upon posts*, no *wast* lieth for it. 4 Le. 241. Pasch. 8 Jac. B. R. Ward's Case.
3. Lord may have an action on the case, or an assise of nuisance for building an *house to the nuisance of his mill*. 3 Salk. 248. Mich. 9 W. 3. Anon.

(E) Pleadings.

1. **S**UIT to a mill is *appendant* to the mill, and in pleading a lease of the mill it is sufficient without mentioning of any thing in the lease of the suit. Arg. 2 Buls. 195. cites 17 E. 3. 64.
2. In assise, the plaint was of a mill, and *did not say water-mill, or wind-mill*, and yet good. Br. Demand, pl. 18. (bis) cites 21. Aff. 23.
3. Feme had title of dower to a toft, and pending the writ, and before the demand made in the same writ the *toft is made a mill*; yet the demand shall be of a toft as it was at the time of the *teste of the writ*; but if it had been made a mill before the writ purchased, there it should be otherwise, as it seems. Br. Demand, pl. 33. cites 13 H. 4. and Fitzh. tit. Dower, 175.

[For more of Mill, see Dismes, Nuisances, Water-courses, and other proper Titles.]

[401]

A mine is not properly so called till it is opened; it is but a vein of coals before; and this was the opinion of my Lord Coke in his first Inst. 54. b. and Justice Twisden said, that he knew no reason why my Lord Coke's single opinion should not be as good an authority as Fitzherbert in his

* Mines.

(A) How to be used.

1. 21 Jac. 1. cap. 1. **E**NACTS that nothing in the said act contained shall extend to any commission or grant concerning the digging, compounding, or making of allom, or allom mines, &c.

3. s. 11, 12.

reason why my Lord Coke's single opinion should not be as good an authority as Fitzherbert in his

his Nat. Br. or the doctor and student. 2 Mod. 193. Hill. 28 & 29 Car. 2. in Case of Asty v. Ballard.—S. P. 3 Keb. 723. in S. C.—† The proviso, concerning the making of allom, or allom mines, in this act needed not, for they belong to the subject in whose ground sever the ore is; and therefore any privilege thereof cannot be granted but in the King's own ground. 3 Inst. 185.—2 Hawk. Pl. C. 234. cap. 79. s. 23. S. P.

2. A man opens a mine in his land, and digs till he *digs under the soil of another*; he may follow his mine there; but if the owner digs there also he may stop his farther progress; and said to be the use in Cornwall. 2 Vent. 342. per Wilde J. on a Case referred to him by Ld. Bridgman. 22 Car. 2.

3. It was said by the Solicitor General, that there was a great *difference between pits and mines*; for if a mine be opened, he that may work the mine is not obliged to *pursue the vein* of ore under ground; but he may sink pits in pursuit of it which are necessary to come at the ore, and as many as he thinks proper; and Ld. Chancellor said, it had been so resolved before Powel J. on great consideration, and consulting and examining the most able miners; Cases in Equity in Ld. C. King's time, 79. November 10. 1729. Clavering v. Clavering.

(A. 2) Who may dig for Mines, in respect of his Estate.

1. **I**F a man demises land for life, or years, in which is a coal mine open, the lessee may dig in it; for the mine being open, it shall be intended by his demising all the land that his intent is as general as his demise; but if the mine was *not open at the time* of the demise, the lessee by lease of the land is not impowered to make new mines; but in such case if he leases his land and all mines therein, the lessee may dig for mines there; resolved. 5 Rep. 12. Trin. 41 Eliz. C. B. Saunder's Case.

S. P. Co. Litt. 54. b. —S. C. cited 2 Mod. 193. accordingly in Case of Asty v. Ballard.—A. seised of lands in fee, in which

were mines unopened, by deed conveyed the lands and all mines, waters, trees &c. to trustees and their heirs to the use of himself for life, remainder to the use of B. for life, remainder to his first &c. son in tail male, remainder over; upon a bill brought after A's death by the heir of A. to prevent B's opening any mine, it was urged that the mines being expressly granted with the lands, it was as strong as if they had been limited to A. for life, and like SAUNDER'S Case. 5 Rep. 12. But Lord C. Macclesfield contra, and held that B. having only an estate for life subject to waste, he shall no more open a mine than he shall cut down timber-trees; for both are equally granted by this deed, and the meaning of inserting mines, timber-trees and water was, that all should pass; but that as the timber and mines were part of the inheritance, no one should have power over them but such as had an estate of inheritance limited to him; and of that opinion was Lord C. King on a re-hearing. 2 Wms's Rep. 240. Mich. 1724. Whatfield v. Bewit.

2. A question was, if *copyholder of inheritance* may dig mines in his land? The Court seemed to think he might; for that otherwise mines there should never be opened; as in the case of the glebe of a parson. Sid. 152. Trin. 15 Car. 2. B. R. in Case of Rutland (Lord) v. Gie.

3. Lands in which are coal-mines not opened are settled upon A. in [402] tail, remainder to B. for life, but not without impeachment of waste, remainder to C. in tail, and A. opened mines and worked them and died without issue; B. the now tenant for life opened the

the earth to pursue the old vein of coals, and C. moved for an injunction to stay the opening the earth in any new place; but Ld. C. King thought B. might work all mines which were lawfully opened by the preceding tenant in tail, tho' subsequent to the settlement, and so denied the injunction. 2 Wms's Rep. 388. Mich. 1726. Clavering v. Clavering.

4. If a person breaks up, or even attempts, or *threatens to break up mines which he ought not to do*, that is a reason for coming into Chancery to have an *injunction*; per Ld. Chancellor. Barn. Chan. Rep. 497. Pasch. 1741. in Case of Gibson v. Smith.

See Wast
(M) pl. 16.

(B) Pass. What shall pass by grant of Mines.

2 Lev. 185. S. C. and the Court held by the one words *land and mines*, there being mines

1. **I**T was said, that when a man is seised of lands wherein there are *mines open, and others not open*; and a lease is made of these lands in which the mines are mentioned; it is no new doctrine to say that the *close mines shall not pass*; Arg. 2 Mod. 123. Hill. 28 & 29 Car. 2. B. R. Asty v. Ballard.
open at the time of the demise, the mines open only passed; and gave judgment accordingly. —
2 Jo. 71. 72. S. C. acc. — 3 Keb. 723. S. C. acc.

[For more of Mines in general, see Prerogative, and other proper Titles.]

Miscasting.

'A) Miscasting by the Plaintiff. Where it shall prevent Judgment.

1. **I**N *annuity* judgment was given quod recuperet annum redditum & arreragia ejusdem tam ante impetrationem brevis quam post incurfa, quæ quidem arreragia in toto se attingunt ad 75 l. and this *was a quarter's annuity more than was incurred*; and this being assigned for error, the Court held it not so, because the judgment was perfect without the casting up the arrears, which is the office of the clerk only; and it appearing by the record, how much the arrears amounted to (the day of purchasing the writ and of the judgment given being certain), the
mistake

mistake was the default of the clerk, and so the first judgment affirmed. D. 55. b. pl. 8. Trin. 35 H. 8. Trewinnarde v. Skewys.

2. *Assumpsit* to pay 12*l.* Jury found a promise to pay 7*l.* the judgment was reversed; because it is not the same *assumpsit*. D. 219. b. Marg. pl. 11. cites 10 Eliz. Billingley's Case.

3. Debt; and declared that the defendant had bargained with him to give him for the pasturing of every horse by the night 2*d.* and for every ox 1*d.* halfpenny, and sheweth that he had pastured 70 horses and 300 oxen, et ideo actio accrevit to demand &c. and he demanded more than upon his own shewing it appeared he should have; for the number of the horses and oxen did not amount to the sum of which he had counted; and this was alleged in arrest of judgment after verdict found for the plaintiff; but judgment was given for the plaintiff notwithstanding. [403] Cro. E. 22. Mich. 25 Eliz. in C. B. More's Case.

4. In a writ of *annuity* plaintiff demanded 20 nobles, and it appeared by his own shewing, he was to have but 19; and the writ was abated by award of the Court. Cro. E. 22. Mich. 25 Eliz. C. B. cited in More's Case per Fenner as Anslow's Case. So in debt upon mutuals of 5*l.* 6*s.* 8*d.* the several sums in the count do not amount to the sum demanded; upon error assigned judgment was reversed. Mo. 298. Pasch. 21 Elis. B. R. Smith v. Vow.—So in debt the demand was of 19*l.* 17*s.* and declares upon 5 several contracts, and shews the certainty upon every one of them, which being cast up amounted to 20*s.* more than was demanded; and because he does not shew how he was satisfied of the remnant 'twas held quod nil capiat. Het. 119. Mich. 4 Car. C. B. Calthrop v. Allen.

5. In debt in a Base Court the plaint was of 6*l.* 14*s.* 2*d.* and declared that the money grew due by 2 several contracts, viz. so much for the one and so much for the other, and which was more by 3*d.* than contained in the plaint; the defendant pleaded as to 6*l.* 14*s.* 2*d.* nil debet &c. and it was found for the plaintiff, and judgment, that the plaintiff recover prout narravit. Error was brought and this matter assigned, for that the judgment is to recover 3*d.* more than was found by the jury to be due; and tho' the defendant pleaded only to the sum contained in the plaint, yet the issue and trial should be of the sum specified in the declaration; and Fenner and Yelverton J. thought it to be clearly error. Yelv. 5. Trin. 44 Eliz. B. R. Crumpton v. Smith. And it seems that there is a diversity where the plaint (for the purpose) is of 10*l.* and the declaration is viz. for 10*l.* for an horse and 5*l.* for another contract, and defendant pleads to the

10*l.* nil debet, and nothing to the other, and it is found accordingly; yet this is good; for the 5*l.* in the declaration is surplusage; because the plaint was answered in toto with the principal contract laid in the declaration, viz. the horse; whereas in the principal case here the monies mentioned in the declaration being upon several contracts and neither of the contracts alone and by itself amounting to the sum specified in the plaint, every part of the declaration is made material, and so being found short by the verdict, the judgment given thereupon seems to be erroneous; per Fenner and Yelverton J. quod Gaudy non multum impugnavit. Ibid.—Noy. 44. S. C. by name of CROMPTON v. SMITH, says it was held error, but because it was of so small a matter as 3*d.* the Court afterwards propounded a composition, to which the parties agreed; and the book says, note D. 55. [which see supra pl. 1.] and the difference; for there the declaration and judgment were good, and the casting up of that after was the act of the clerk.

6. An action on the case against an executor on the *assumpsit* of the testator for several wares of several values expressed, quæ in toto attingunt, and mistakes the sum-total, and makes it less than the particulars, and *assumpsit* to pay this; yet well, for it is less, and it is the * fault of the clerk; otherwise, as it seem'd to some where the

* For the miscasting of a clerk shall not prejudice, especially where it is the

less than it ought to be. *Cro. J. 569. Spore v. Drury.*—*In Case on assumpsit, it was over* *the sum is made greater than the particulars amount to, and assumpsit to pay the said greater sum, if vitium clerici be the reason of the said judgment. Jenk. 318. pl. 13. cites † 8 Jac. SPORE's Case, and 8 Jac. ADERTON's Case and says Cro. 247. is not well printed.*

cast 31. and on error brought it was amended. 1 Buls. 171. *Armitage v. Dison.*—*Ibid. cites GAUGHTON's Case to the same purpose. 3 Buls. 156. cites S. P. resolved at Serjeant's Inn.*—*Roll. R. 335. says that the S. P. was so adjudged.*

† It should be (18) and is *Cro. J. 569. Pasch. 18 Jac. in the Exchequer Chamber. Spore v. Drury.*

The mistaking is under the sum by the plaintiff in his declaration and judgment reversed; but it is said, Note, this was upon the first motion without further advisement. *Cro. J. 247. Trin. 8 Jac. Aderton v. Dunstar.*

There is a diversity, where the plaintiff frames his declaration according to an account of particular sums *taken by himself*, and where it is *by the parties which assume* to pay for the several commodities delivered quæ in toto se attingunt to so much wherein the mistake is, if it be *by the party himself* and there is more cast up in the last total than in the former, this is not idem, nor yet amendable; but otherwise it is where the same is done by the party *which assumes*; per *Fleming Ch. J. 1 Buls. 180. Busby v. Hadderton.*—*Noy. 88. Kitley v. Haines.*—*Assumpsit to deliver 20 pound of cummin and alledges breach in not delivery of 21, it is ill being apparently for more than he ought to have. Jenk. 288. pl. 22.*

For de minimis non curat lex.
Jenk. 287. pl. 22. S. C.
[404]
—*Noy. 44. 45. by the name of Crompton v. Smith.*

7. A. sells B. as many oats, as according to the rate of 10s. 6d. per quarter comes to 52l. whereas 96 quarters and 6 bushels comes to 52l. and *three farthings over*; and it is not possible in effect to order the measure so as to hit just the sum, (as the odd hours in a year are not accounted in the year) and so because the *account was so nice and the odds so trifling*, judgment was given for B. the plaintiff. *Hob. 88. Hill. 11 Jac. Lastlow v. Tomlinson.*

8. In *assumpsit* the plaintiff counted, that in consideration he should dye divers cloths into several colours, and named so many severally, as amounted in all to be 60. The defendant promised to pay him so much for the dying of every several cloth, and avers that he did accordingly dye the said cloths, amounting in all to 59 (whereas in fact they were 60 as above) and that the money came to 19l. It was adjudged for the plaintiff, and was assigned for error, that it appeared he should have dyed 60 and dyed but 59, and so the 19l. not due. But judgment was affirmed; for it was *first averr'd that he dyed all*, which appeared before to be 60, so that the other was only a mis-summing. *Hob. 89. Trin. 12 Jac. Rot. 1599. in the Exchequer Chamber. Bayle v. Gird.*

1 Roll. R. 335. Hill. 13 Jac. B. R. S. C. *Farrer v. Snelling.*—*3 Buls. 155. S. C.*—*2 Buls. 149. —2 Lev. 56. Bolton v. Lee.*—*Hob. 89. Bayle v. Bird.*—*2 Lev. 4. Halm v. Sanders.*

9. *Covenant for payment of rent of 20l. per annum for four years and a half; and for non-payment of 110l. according to the said covenant the action is brought: adjudged good, and affirmed in error: for in covenant damages only are to be recovered; and this surplus in miscomputing shall be abated: it is otherwise in a debt for rent, where more is demanded than is due; for in this case the debt demanded only is to be recovered. Jenk. 324. pl. 38. cites Mich. 13 Jac. B. R. Farrer v. Snelling.*

10. Where an action is grounded on a *specialty* or a *contract* for a sum certain or a *statute* which gives a certain sum for a penalty, he must * not vary from the sum. But when the demand is of no certain sum, his varying from the first sum is not material; for he shall not recover according to his demand in the declaration, but according to the verdict. Cro. J. 498. Mich. 16 Jac. B. R. † Pemberton v. Shelton.

But where the certainty of the demand cannot appear but from matter of fact debors the deed or contract, which

the deed or contract refers to, there the variance will not vitiate. Farr. 88. Gripps v. Ingledon.

* S. P. without any matter debors to help it. Farr. 88. Gripps v. Ingledew. — Because if he does he may bring action for the very sum, and so the defendant shall be twice charged; per Montague Ch. J. 2 Roll R. 55. S. C.

† 2 Roll R. 54. S. C. and says it was on the statute of 2 E. 6. of *Tithes*.

11. In an *information for recusancy* the demand was of less than according to the statute it amounted to, yet the plaintiff had judgment. 2 Roll R. 90. Pasch. 17 Jac. B. R. Sir Geo. Curson's Case.

12. Plaintiff declares on a sale of several parcels of tobacco, viz. for one parcel 5*l.* and for another 3*l.* 2*s.* 6*d.* &c. and concludes *Qua &c. in toto se attingunt* to 55*l.* which on a computation is less than the particulars; per Jones and Whitlock J. only present, the count is good; for there is a particular promise for every parcel, and the summing up the particulars, is only surplusage and officiousness of the clerk, and so judgment was affirmed. Poph. 209. Hill. 2 Car. Risley v. Haines. Lat. 175. S. C.

13. In *assumpsit* for 11*l.* the plaintiff counts *pro diversis denariorum summis lent at several times*; the jury found the defendant indebted but in 10*l.* yet the plaintiff had judgment, and shall be barr'd for the residue; for it is for diverse things; but it had been otherwise if it was of one *intire contract*. D. 219. b. Marg. pl. 11. cites 3 Car. in Scacc. Walton v. Boats.

14. In case by A. against B. the count was, that B. was indebted to C. in 43*l.* 1*s.* for &c. which he promis'd to pay him, and that C. was indebted to A. and became bankrupt, and that the commissioners did assign the debts of C. in *quadam schedula* containing the said debt of 43*l.* 1*s.* B. pleaded that he made no such promise to C. The verdict found that B. was indebted to C. in 41*l.* 1*s.* which he promised to pay, and that the commissioners assigned the debts of C. in *quadam schedula* containing the aforesaid sum of 43*l.* 1*s.* to the plaintiff. Resolved that this is the same promise, and if C. himself had brought the action, he should have recovered upon this verdict, and A. now stands in his place. And. 2. the assignment is not in question; for the issue and the verdict are concluded to the promise, and so that which they find touching the assignment is not material; however the assignment is not laid to be of such a sum, as by that name, for then it would have been a question, whether good or not; and the Court inclined that it would have been good. But the assignment is laid to be of the debts of C. mentioned in a schedule, containing 43*l.* 1*s.* and so it was found by the jury, and therefore theq

the Court shall intend it to be in such a manner, as that the debt of 41*l.* 1*s.* might well pass thereby. And after much debate judgment was given for the plaintiff. All. 28. Mich. 23 Car. B. R. Baker v. Edmonds.

15. If an action be on the *contract itself* &c. there if the party mistakes the sum agreed upon, he fails in his action; but if he brings his action upon the *promise in law*, which arises from the debt, there, tho' he mistake in the sum, he shall recover; and so hath it been adjudged. Allen 29. Mich. 23 Car. B. R. in Case of Baker v. Edmonds.

16. An action was brought upon an *indeb. ass.* for 190 *weathers* sold by the plaintiff to the defendant at 18*s.* a *sheep*, which in all amounts to 190*l.* Issue was joined and a verdict for the plaintiff. The declaration was held repugnant, and judgment that nil capiat per breve. Sti. 214. Pasch. 1649. Bolton v. Wills.

Lev. 58. 17. If the *damages given by the jury* are not more than the plaintiff has laid in his declaration, the mistaking is nothing. Hunt v. Harlewood. —2 Roll. Sti. 341. Mich. 1652. B. R. Watts v. Lowth.

R. 126. Griffin's Case. —2 Lev. 99. Vanafton v. Mackarley.

Hob. 164. 18. In an *avowry for rent*, if it appears by the shewing of the party himself, that *part is not yet due*, yet the avowry is good for the residue, and shall not *abate* for the whole. Arg. Saund. 286. Otherwise if found so by verdict, Trin. 21 Car. 2. cites 11 Rep. . . . Godfrey's Case.

in Case of Colt v. Glover. —If the quantity of the rent be equal and agreed in pleading, and the variance be only upon part arrear, there tho' the avowant avows for more than is in arrear, yet he shall have return for so much as is arrear. Otherwise where the parties differ upon the quantity of the rent, and it appears that he is intitled but to two parts of which he avows for, and not to all it is otherwise. Mo. 281. Battey v. Trevilian. —Cited Saund. 286. in Case of Duppa executor of Baskervill v. Mayo.

19. Bond for *delivery of 35000 tiles*, to the value of 144*l.* at 15*s.* 6*d.* per 1000, where it should have been 135000. Penalty of the bond was 288*l.* The intent was to pay a debt of 144*l.* in tiles at 15*s.* 6*d.* per 1000. Besides by this mistake the condition is impossible, so utraque via 'tis with the plaintiff, and judgment accordingly. 2 Show. 15. Trin. 30 Car. 2. B. R. Holmes v. Ivy.

* Farr. 88. 20. In *debt of rent* the plaintiff declared for 100*l.* due for so many years, and it appeared upon casting up the sums, that he had declar'd for 8*l.* too much, yet the Court was of opinion that he might recover for the residue. 5 Mod. 215. Pasch. 8 W. 3. * Thwaites's Case.

S. P. —Farr. 91. per Holt Ch. J. S. P. in Case of Grips v. Ingledew.

21. The difference is between a *debt arising by deed*, but referring to something *dehors*, and a *debt stated in the deed itself*. In the first case the plaintiff by remitting of his demand sets all right, but otherwise in the last. Farr. 87. Mich. 1 Ann. B. R. Grips v. Ingledew.

[See, for more of Mistaking in general, Trial (C. g.) pl. 1. to 8. and other proper Titles.]

* Misnosmer.

* The law does not favour advantages of misnosmer any further than the strict rule of law requires, neither in writs which may be abated, and new purchased in their room.

(A) ** What is Misnosmer in particular in Christian and Surnames, *idem sonantia*.

1. † *Julian* and *Gylian* is not one and the same name; quære. Br. Misnosmer, pl. 44. cites 26 Aff. 16.

nor principally in grants or other conveyances, in which case the party has no remedy to have new. 6 Rep. 64. b. in Sir Moyle Finch's Case.

** The names of men at this day are only sounds for distinction sake, tho' they perhaps originally imported something more, as some natural qualities, features, or relations; but now there is no other use of them, but to mark out the families, or individuals we speak of, and to difference them from all others. G. Hist. C. B. 181. cap. 17.

† But where debt upon bond was brought against J. by the name of *Jacob*, and he pleaded, that he was called and known by the name of *Jaacob*, and not *Jacob*, it was over-ruled. 1 Mod. 107. Pasch. 26 Car. 2. B. R. Jacob Aboab's Case.

2. In debt the obligation was * *Baxter with an s*, and the writ *Baxter without an s*, and exception was taken, & non allocatur; for it bears one and the same sound; quod nota. Br. Misnosmer, pl. 18. cites 3 H. 4. 4.

* S. P. 3 Bulf. 121. in Case of Jones v. Stenar.

3. In audita querela the writ was *W. Langwhat*, and the indenture of defeasance upon which &c. was *Langawhat*, and therefore ill; but it was amended by the statute: And per Portman, *Dekawra* for *Dekawra*, shall abate the writ. Br. Misnosmer, pl. 32. cites 21 H. 6. 7.

4. *Burgeles* for *Burges* was held good in a lease by him, the defendant pleading that *Burges* by the name of *Burgeles* released &c. Br. Faits, pl. 34. cites 22 H. 6. 48.

Br. Misnosmer, pl. 36. cites S. C.

5. *Strayte* and *Strete* are not all one. Br. Misnosmer, pl. 48. cites 5 E. 4. 57. per Cur.

6. In trespass, a man outlawed by name of *J. Stek* and taken by capias utlagatum said that his name is *J. Stekes*, and not *J. Stek*, and had sci. fa. against the plaintiff, who said, that known by the one name and by the other &c. Br. Misnosmer, pl. 58. cites 14 E. 4. 6.

7. Note, that where the original was *Senjohn* without a *t*, and the exigent was *Sayntjohn* with a *y* and *t*, therefore the outlawry was reversed; for there is as much difference as between Hereford and Hertford. Br. Misnosmer, pl. 80. cites 2 R. 3. 13.

Br. Misnosmer, pl. 61. cites S. C.

8. *Forster* and *Foster* is no error in a fine. Cro. J. 77. E. of Rutland v. Forster.—So *Sarmine* for *Sarmin* will not vitiate a bond for the variance. 3 Lev. 66. Cull v. Sarmin.

9. It

So of *Maure*
and *More*,
Hoorde and
Hode, *Elvill*
and *Elvin*.
Cited 2 Roll.
R. 168.

9. It was assigned for error, that one *Baskervill* was returned upon a venire facias, and the name of *Baskerfield* was upon the distringas; for field is campus, and vill is locus ubi sunt multa habitacula; and all the Judges held clearly that it was error. But Mountague Ch. J. thought that they were *not several names, but only a name differing in the sound*, as *Stoke* and *Stoakes*, *Hastin* and *Hastings*. 2 Roll. R. 168. Trin. 18 Jac. B. R. in Case of *Macduncon v. Stafford*.

So of *Hare-*
wood and
Harwood;
contra
where in
the venire
facias a
juror was
named

10. In an action upon the case for malicious prosecution upon an indictment one of the jurors names in the declaration was *Lancester*, and in the record it was *Lancaster*; and ruled no variance, tho' of different sound, but shall be intended the same record. Contra *Mainard*, who was for the defendant. All. 91. Mich. 24 Car. B. R. Anon.

[407] *Swift*, and in the distringas & jurati named *Swift*; for where there is an (s) for an (f) it is clearly bad; for they have not the like pronunciation. 3 Bull. 121. Mich. 13 Jas. Jones v. Stenor.

So of *Segear*
and *Segar*.
1 Roll R.
415. Mich.

11. *Nunne* and *Nonne* are words of the same sound; per Cur. 2 Jo. 219. Trin. 34 Car. 2. B. R. *Nonne v. Maxey*.

14 Jac. B. R. *Brunger v. Segar*.—So *Bikerstaffe* and *Bickerstaffe*. 1 Vent. 73. Pasch. 22 Car. 2. B. R. *Heskett v. Lee*.—So *Clipston* and *Clepston*; so *Bofon* and *Bozon*; per *Fulverton J.* Bull. 8.

12. There is a substantial variance in sound, original and common use, that is not amendable. As if a man declared against *J. S.* and *Agnes* his wife, and the record of *Nisi Prius* is *Anne* his wife; this is a material variance, and not amendable. G. Hist. C. B. 177. cap. 17.

(A. 2) What is, *By altering the Name into another Language.*

1. A *Sfise* by an infant by name of *Tb. filius Jobannis hum. in Latin*; the defendant said that the plaintiff was a bastard, and if &c. nul tort; and it was found that he was a bastard, and was seised and disseised, and that he is known by the name *supra*; and because he does not claim as heir, it suffices to name him by the name by which he is known, and also he was an infant, in whom shall not be adjudged misprision, wherefore he recovered the land and damages; quod nota. Br. Nofme, pl. 39. cites 35 Aff. 13.

2. *Præcipe quod reddat versus Johannem filium R. at T.* the other said that *John* is a bastard, judgment of the writ; Finch. said, he is known by this name; per *Thorp*, if he be a bastard, yet he is son, and awarded the writ good; quod nota; and yet he was named *J. filius R.* in Latin, but if it was in English, it may be taken for a surname; for per *Kirton*, where it is in Latin, he shall not say that known by this name only; *Thorpe contra*, by award. Br. Misnomer, pl. 39. cites 39 E. 3. 24.

3. In debt, if the *name* of the defendant be *J. Fitzwilliam*, and the writ is *Præcipe Johanni Filio Wilhelmi*, it is a good plea to the writ that his father's name was Roger; for Fitzwilliam is a surname, but *Filius Wilhelmi* is the proper name of the father; note the diversity; for the translation of the name from the vulgar language into Latin will alter the matter. Br. Misnomer, pl. 12. cites 40 E. 3. 22.

Br. Brief, pl. 468. cites S. C. — pl. 67. cites 44 E. 3. 12.

4. If there are *two English names* that are *distinct*, and *one Latin name* for *them both*, this makes no alteration in the record; as *James* and *Jacob* are two English names, and for them there is one Latin word, viz. *Jacobus*; a direction to Jacob. Vice Com. the return was *Respond' Jacob'*; and well enough. G. Hist. C. B. 177. cap. 17.

5. A writ was *ad respondendum J. S. & Fidei uxori ejus* and the defendant pleaded in abatement of the writ, because the *name* of the wife was (*Faith*) in *English*, therefore they pretended that it should be [*Fidei*.] Rhodes said he knew a wife called (*Troth*) in *English*, and she was called (*Trothia*) in *Latin*, and it was good. And all the Court adjudged this writ good here. Goldsb. 86. pl. 10. Pasch. 30 Eliz. Anon.

(B) What is. By Omissions.

1. **T**HE King licensed N. to found a Provost of a Chauntry, which shall be called *Provost of the Chauntry of C.* and after the King impleaded by name of *Provost of the House of C.* [408] and for this misnomer the quare impedit abated, tho' it was averred for the King that it was known by this name. Br. Misnomer, pl. 24. cites 38 E. 3. 14.

2. Writ was brought against *Priores of Newark* of D. and was abated because it was not *Priores of the House of Newark*; quod nota bene. Br. Misnomer, pl. 25. cites 38 E. 3. 28.

3. *Præcipe quod reddat* was against *Mich. of Tryage*, and protection, for *quia moratur* was shewn forth for *Mich. Tryage* without (of) and for the variance it was disallowed by award. And per Thirning, Culpepper, and Hill, Justices, *M. of T.* and *M. T.* cannot be intended one and the same person; contra Hanke, but it was adjudged ut supra against Hanke. Nota. Br. Misnomer, pl. 22. cites 11 H. 4. 70.

(B. 2) Difference between Misnomer in Grants, Obligations &c. and judicial Proceedings.

1. **I**N conveyances in *finés* or *feoffments*, the change of the real christian name into another name does not avoid it; for there is *no apparent mistake of the clerk*, and charters receive a benign interpretation, and most against the grantor. G. Hist. C. B. 176, 177. cap. 17.

2. If

2. If two names are in original derivation the same, and are taken promiscuously to be the same in common use, tho' they differ in sound, yet there is no variance; as *Piers Griffith* brought an *audita querela*, and *outlawry* was pleaded by the name of *Peter Griffith*, and allowed. G. Hist. C. B. 177. cap. 17.

3. It does not follow that what will be sufficient to amount to a *descriptio personæ*, to enable a man to *take by* will be sufficient for him to *sue by*. Per Eyre and Powis junior, J. 10 Mod. 208. Hill. 12 Ann. B. R. in Case of Cambridge University v. Archbishop of York.—Als. *Vavafor v. Crofts*.

See Estoppel
(O) (Q)
per tot.

(C) Pleadings.

1. **A**SSISE against Julian, the defendant pleaded a *feoffment* by deed by the ancestor to the defendant by name of Gylan; and it was held that he ought to plead by the name contained in the deed; for Julian and Gylan is not one and the same name. Quere. Br. Misnomer, pl. 44. cites 26. Ass. 16.

2. Note per Kirton, that if action be taken against W. T. he cannot say that his name is R. T. Judgment of the writ; for it cannot be intended the same person; and judgment given against W. T. shall not bind R. T. Br. Misnomer, pl. 11. cites 40 E. 3. 3.

3. Trespass against J. T. prior of N. and one came in proper person, and said that he is prior of N. and that his name is T. D. and not J. T. Judgment of the writ, and the plaintiff said that J. T. was abbot the day of the writ purchased, & non allocatur, without saying, and yet is; and the other that he is not abbot, Prist; and if he was abbot the day of the writ, and deposed after, this ought to be shewn *ex parte querentis*. Per Newton, Ch. J. Br. Misnomer, pl. 35. cites 22 H. 6. 45.

And yet the
baron shall
plead for
himself also,
and so he
[409]
did, and
said that he
had nothing
in the land
but in right of Agnes his wife who is now alive not named in the writ. Judgment of the writ, and a good plea per Cur. quod nota. good case. Ibid.

4. Scire facias against R. and Anne his feme, and he and his feme came in proper person, and said that you have here R. L. and Agnes his feme, in proper person, which Agnes was warned by name of Anne, and is named Anne in the scire facias, and demanded judgment of the writ; for her name is Agnes and not Anne, and it is a good plea by them for the feme, and if it be found it goes to all. Br. Misnomer, pl. 8. cites 33 H. 6. 22.

5. In Qua. Imp. for the church of Taunton, defendant pleaded a fine of Tivertannton; per Frowike Ch. J. defendant need not aver them to be all one, unless the names in the fine and in the action were clear contrary. Kelw. 49. b. P. 18 H. 7. pl. 1.

6. Debt against J. S. executor of the testament of J. N. and upon the *capias* the defendant came in gratis, and said, that where he is named J. S. his name is R. S. Per Edgar he shall not have the plea; for J. S. and R. S. cannot be intended one and the same person, and

and the sheriff cannot take the one for the other, and so no damage to him. But Frowike and Vavisor contra, and that he may have the plea for the mischief of outlawry, *and there is perfect consufance here that he is the same person*, because he is named *executor of J. N. Quære*. B. Misnomer, pl. 40. cites 21 H. 7. 8

7. Obligation by John Cozen, and the acquittance is John Cousin, it is not good, without *averment* that he is known by the one name and the other. And. 212. in Case of Mariot v. Mascall.

8. Debt; and counts *quod cum prædict' Jacobus per nomen Johannis Winlow* such a day and year, *per quoddam scriptum suum* obligatorium concessit &c. Defendant demanded oyer &c. by which it appeared that defendant, by the name of John Winlow *fecit scriptum* &c. And the condition was, if James Winlow paid &c. Whereupon defendant demurred &c. and per tot. Cur. the action lay not, for John cannot be James. Cro. E. 897. Field v. James Winlow, als. dict' John Winlow.

9. If the plea be of an acre, and the deed of a manor, it is well; for the acre may be parcel of the manor. Jenk. 170. pl. 33.

10. The safe method of pleading, where there is a variance between the plea and the deed, is to plead that the land in the plaint was convey'd by the name expressed in the deed. And so in all cases where there is no repugnancy between the deed and the plea; unless in a case which cannot stand with law. Jenk. 170. pl. 33.

11. Assumpsit against Jermin. Defendant pleads his name is Jermy, absque hoc, that it is Jermin. Per Cur. it is a material variance, but cured by defendant's appearance; but defendant ought to plead *quod Jermy, qui implacitatus est per nomen Jermin, dicit*, that his name is Jermy. So judgment was, quod Resp. ouster. Cumb. 188. Hill. 3 W. & M. Tallent v. Jermy.

The pleading was thus, viz. *Et prædictus John Germyn (with an n.) venit & defendit &c. & dicit,*

that his name is Germy, & non Germyn prout &c. Carth. 207. Tallint v. Germyn.

12. The defendant pleads, that he was baptized by the name of Michæ, and not Michael; the plaintiff replies, that he is known as well by the name of Michael as Michæ. The defendant demurs, because he ought to have traversed that he was baptized, and not that he was known by one name and the other; for a man cannot have two christian names. And judgment was given for the defendant. L. P. R. 5. cites Pasch. 7 W. regis.

13. The declaration must be of the name in the obligation with an alias of the real name; for the declaration, as it is said, must shew the cause of complaint, as it is; therefore it must in all things follow the obligation, and the intent of the alias is only to shew he has been differently called from the name in the obligation; and therefore † if a man oblige himself by the name of J. S. esq; and afterwards he is made a knight, the plaintiff cannot

S. P. adjudged Bull. 216. Trin. 10 Jac. Saxey v. Whempton. — See D. 279. b. pl. 9. Hickman v.

Shotbolt — not declare against J. S. knight, alias J. S. esq; G. Hist. C. B. 179.
Where one is misnamed cap. 17.

in a bond,

the writ must be brought against him by the *same name* as in the bond. R. S. L. 7. Cites Dyer 279. — † Bulf. 216. per Yelverton J. in Case of Saxey v. Whempson.

[410] (C. 2) Pleadings. *In what Cases it is a good Plea.*

At common law, if a person be indicted by a wrong christian name,

1. **A** Man may plead misnomer of his *name of baptism in every case except in case of felony*; for in felony he shall answer to the felony; per Rolfe; quod non negatur. Br. Misnomer, pl. 6. cites 3 H. 6. 22. and 26.

name, yet he shall not plead misnomer to the felony; for the *indictment is sworn against the party present*, and appearing to their view, and so no injury by the misnomer, as might be where the party appears by attorney; and felons generally go by no certain name, and have no fixed habitation; and therefore this is altered by the statute of Additions. G. Hist. C. B. 175. cap. 17.

The plea of misnomer was allowed in abatement to an *indictment of murder*. Carth. 297. Hill. 5 W. & M. the Lord Banbury's Case.

But in appeal he may plead misnomer, and this by Rolfe, viz. in name of baptism. Ibid.

2. If the *inquest be taken upon misnomer of the party who is indicted, and find it*; upon such manner of verdict the party shall not have conspiracy; quære of this misnomer; for it is said 3 H. 6. 26. that he shall not plead misnomer, but not guilty, and the inquest shall inquire if he be the same person or not. Br. Conspiracy, pl. 2. cites 33 H. 6. [1] and 34 H. 6. 9.

3 It shall not be a plea where the *action is founded upon specialty*; contra where it is *upon matter in fact*. Br. Misnomer, pl. 57.

(C. 3) Pleadings. *By whom.*

1. **A** Ssise against Isabel; it was taken a good plea, that *she had to name Elizabeth and not Isabel*, judgment of the writ; but it is doubted, whether a *bailiff* shall plead such plea in assize, or attorney; but the party himself in person may clearly. Br. Misnomer, pl. 43. cites 20 Ass. 61.

S. P. Br. Misnomer, pl. 13. cites S. C. But J. S. shall not have such plea.

2. Trespass against J. S. and A. it is a good plea for A. to say *that she is the feme of J. S. not named feme*; judgment of the writ. Br. Brief, pl. 56. cites 42 E. 3. 23.

S. P. tho' they are one person in law. 6 Rep. 64. b. in Sir Moyle Finch's Case.

3. So where it is brought against J. S. and A. his feme, A. may say *that she is not the feme of J. S.* judgment of the writ; but J. S. shall not have the plea, per tot. Cur. And the reason seems to be inasmuch as *none* shall plead misnomer, but the party himself. Br. Brief, pl. 56. cites 42 E. 3. 23.

Do't against two executors, the one cannot plead misnomer of his companion in this action, nor in an action real. Br. Misnomer, pl. 69. cites 14 H. 6. 3. — But may say in this action, *that the executor named him and one J. N. (naming his companion by his right name) his executors*, which J. N. is alive not named in the writ, judgment of the writ. Ibid. — Or in *precipe quod reddat* against

two, and the one is misnamed, the other cannot plead misnomer of him, but may say, that he holds jointly with one such &c. of the gift of A. B. not named in the writ &c. Judgment of the writ &c. Ibid.

* S. P. Br. Misnomer, pl. 13. cites S. C.—S. P. Br. Affise, pl. 306. cites 29 Aff. 70.—S. P. Br. Trespass, pl. 37. cites 35 H. 6. 50, 51. Br. Misnomer, pl. 10 cites S. C.—S. P. Br. Misnomer, pl. 63. cites 29 Aff. 70. and 20 H. 6. 30.—Lutw. 36. Mich. 9 W. 3. C. B. Shovel v. Evance.—If two are join'd in a writ, the one shall not plead misnomer of the other. 6 Rep. 64. b. cites 14 H. 6. 3. b. and says the reason is, that misnomers are not favour'd in law to have advantages taken of them; in detestation of nice and dilatory exceptions.

4. Debt against J. H. of D. the defendant said by attorney, that there is D. in H. and D. in F. and none without addition. And per Chaunt. attorney may well plead this; for it is not parcel of the name of his master; by which the other said, that there is a vill of D. in the same county without addition, Prist; and the other e contra. Br. Misnomer, pl. 76. cites 10 H. 6. 26.

Attorney may plead that which enlarges the name of his master, and is not con-

trary to his warrant. Br. Misnomer, pl. 62. cites 2 H. 6. 10. 11.

5. Debt against a feme; at the exigent, she render'd herself, and the sheriff returned quod reddidit se; and upon this she came, and said, You have here J. who was the feme of R. F. who is sued by the name of J. who was the feme of J. F. and said, that her baron had to name R. and not J. Judgment of the writ; and admitted a good plea, tho' she herself answered; for it was agreed, that several who come at the capias, or at the pone gratis, may plead misnomer; quod nota; and so see that she pleaded misnomer of another person, viz. of her baron. But it seems now, that this is as parcel of her name. Br. Misnomer, pl. 29. cites 19 H. 6. 43.

6. The baron may plead misnomer of his feme to the writ; contrary of other persons. Br. Brief, pl. 426. cites P. 3 H. 6. 22.

As in trespass against J. and M. his feme, he appear'd,

and said, that the feme's name was E. and not M. Judgment of the writ; and a good plea, per Bingham; quod nullus negavit. Br. Misnomer, pl. 30. cites 22 H. 6. 45.—So in affise against A. and Margery his feme, who said that Margery was dead before the writ was purchased, and his now feme is named Margaret; judgment of the writ, and the writ abated. Br. Misnomer, pl. 45. cites 30 Aff. 19.—But it should be 30 Aff. (16.)

7. Debt by Al. Baff, where her name was Al. Coff, and the defendant would have pleaded misnomer by his attorney by special warrant against Al. Coff, who brought writ by name of Al. Baff, and it was admitted that he cannot plead it by attorney; and the warrant was not admitted; for he was a stranger. Br. Misnomer, pl. 51. cites 5 E. 4. 108.

So if a man impleaded by misnomer impales, he cannot by attorney, nor in proper person, come

after, and plead misnomer, nor other thing contra to the warrant of attorney. Br. Misnomer, pl. 72.—But it is said that where J. S. is impleaded by name of W. S. the attorney by special warrant may plead misnomer, in such form. viz. J. S. who is here impleaded by name of W. S. posuit loco suo &c. And so see Misnomer pleaded in name of baptism; quære thereof; for it is but a note. Br. Misnomer, pl. 55. cites 8 E. 4. 9.

8. Appeal or trespass against several, the one cannot plead misnomer of the other, but he may plead the death of his companion, or that there is no such in rerum natura; for the one proves that the writ shall abate, and the other proves that the writ was never good. Br. Misnomer, pl. 59. cites 21 E. 4. 70, 71.

* See Error
(L. b.)

(C. 4) * Pleadings. *At what Time.*

1. **I**N præcipe quod reddat *at the Grand Cape against W. N.* he may come and say that his land is seised into the hands of the King, and that his name is R. and not W. Br. Misnomer, pl. 35. cites 22 H. 6. 45. per Newton.

2. In debt against J. Wrybolt he was returned nihil upon the original, & non est inventus upon the capias, and appeared and pleaded gratis misnomer Wrybolt for Wrybolt; and by some he shall have the plea gratis as here to avoid vexation; but by the best opinion if he comes by process served, or in ward, he shall have the plea, but not when he comes gratis; for he is at no prejudice; because if the sheriff takes him or his goods, he shall have trespass, or false imprisonment; for he is not the same person. Br. Misnomer, pl. 54. cites 3 E. 4. 15.

3. If exigent be awarded against R. P. and he renders himself to the sheriff, he shall not plead that he is W. P. and not R. P. for he came in without garnishment; but if a man comes by capias, or distress, or by summons of his land, he shall plead misnomer, for the trouble which he has of his person, goods or lands. Br. Misnomer, pl. 56. cites 8 E. 4. 18. per Littleton.

[412] 4. If a corporation be impleaded by another name than their foundation is, and one appears for them as attorney and imparles, they cannot plead misnomer after; per tot. Cur. Br. Estoppel, pl. 93. cites 15 H. 7. 14.

So of other

persons. Ibid. pl. 72.—Note, that in debt against J. prior of the church of St. Peter of C. he imparled by attorney, and at the day came and pleaded that it is founded by the name of prior of the church of St. Peter and Paul of D. Judgment of the writ; and because he had imparled by attorney before, therefore was ousted of the plea, per Cur. for this is all but one name. Br. Misnomer, pl. 9. cites 35 H. 6. 5.—So where he imparles by the name of the prior of St. Peter and Paul, he shall not say that he is prior of St. Peter only; for it is all one. Ibid.—For when he affirms his name, he cannot plead misnomer after. Ibid.—And it is not like where a man is named of D. and imparles, and after comes and says, that there is Over D. and Nether D. and none without addition; for this stands with, and is only addition, and no part of his name. Ibid.

5. Motion to set aside a judgment irregularly entered up, and to set aside the execution thereon. Charles Earl of Banbury gave a warrant of attorney to enter up judgment by that name, but the plaintiff entered it up by the name of Charles Knowles Esq, it appeared that the bond was by the name of Charles Earl of Banbury &c. The Court set it aside, but said, if a nobleman will admit himself to have a wrong name, so that it cannot appear to the Court that he is a peer, he shall not after say he is a peer, and so to alter the nature of the execution. 11 Mod. 94. Mich. 5 Ann. in B. R. *Ld. Banbury's Case.*

(C. 5) Pleadings. *Estoppel* in what Cases.

See *Estoppel* (O).

1. PURCHASE of charter of pardon, where a man is misnamed and outlawed of it, shall not conclude him to plead misnomer; for he cannot otherwise purchase the pardon but according to the name in the record; quod nota. Br. Misnomer, pl. 32. cites 18 R. 2.

2. Joan T. brought appeal of death against B. by name of Cicily T. and after that the defendant had imparled, she came and said that her name was C. and prayed &c. by which the defendant went without day; quære if she shall have other suit by name of C. It seems that she may. Br. Misnomer, pl. 23. cites 9 H. 5. 1.

3. Where I bring an action against another by name J. D. and the defendant admits this name, and I * recover where my name in fact is W. D. the defendant shall estop me in another action by name of W. D. to say that my name is other than J. D. Br. Misnomer, pl. 78. cites 30 H. 6. 2. per Fortescue.

But a stranger to the record cannot so estop me; quære therefore, if J. D. be impleaded Ibid.—

If he shall say that he is W. D. It seems that he shall not; for he is not this person. * Orig. (record').

4. Where action is brought against J. H. where his name is R. H. and he appears and pleads and suffers it, this shall be estoppel between them in all other actions after. Br. Misnomer, pl. 7. cites 33 H. 6. 7. 19. 50.

But contra between him and strangers. Ibid.—But upon reco-

very against him by default by such name, there it shall not be estoppel to him; for it cannot be intended the same person; note a diversity. Ibid.

5. If a man recovers debt in a base Court by name of J. Hastings, where his name is J. Hastingses, yet it is good, and he may bring action at the common law of the debt recovered, and he may aver that he is the same person. Br. Misnomer, pl. 68. cites 9 E. 4. 41, 42. per Littleton, Fairfax, Chocke, Needham, and Jenney.

But where he recovers by misnomer in Court of record contra; for in the one case he may say that he

by name &c. recovered in the base Court; but upon recovery in the Court of record he cannot vary from the name which is contained in the record; nota. Ibid.

6. In assumpsit against B. plaintiff declared, that in consideration he would be bail for him in a plaint of debt commenced by Adderby against B. in London, he promised to save him harmless, and shews that execution was awarded against the plaintiff and he was forced to pay the money; the jury found the promise, but likewise found that the first action was conceived and entered by the name of Adderby, and the bail put in by that name, but that the declaration was by the name of Adderley, and the whole proceedings after were in that name. Adjudged, that the plaintiff nil capiat per breve; for the special matter proves, that the plaintiff had no cause of action notwithstanding the finding the assumpsit;

[413] G. Hist. of C. B. 179. 180. cites S. C. and adds this reason viz. That the verdict has no credit against a record, and that therefore it cannot recon-

cile the
difference
that appear-
ed between
the records.

—S. C.
Cro. E.

458. (bis)

Pasch. 38 Eliz. by name of Frampton v. Delamere.

for he was not damnified by reason of the bail at the suit of (*Adderby*) for which the assumpsit was made, but *the taking the plaintiff was tortiously done*, he not being bail for (*Adderley*) nor was the defendant's promise on account of such bail. Mo. 407. Trin. 37 Eliz. *Adderby v. Boothby*.

7. If a man is impleaded by his wrong name, and *upon the plea in bar* pleaded, judgment is given for the defendant; if he be afterwards impleaded by his right name, he may plead in bar the former judgment, and *aver that he is un' & ead' persona*; for no man ought to be forced to take advantage of the misnomer. G. Hist. C. B. 176. cap. 17.

8 In *grants* and obligations, the mistake of the *surname* doth not vitiate; because there is no repugnancy that a person should have two surnames; so that he may be impleaded by the name in the deed, and his real name brought in by an alias, and then the name in the deed he cannot deny, because he is estopped to say any thing contrary to his deed; for that is what they call an *absurdity to deny that which the party himself has formerly admitted*; and he cannot with success deny his real name, as an obligation of *John Gate* where his name is *Gape* is good. G. Hist. C. B. 178, 179. cap. 17.

(C. 6) Abatement of Writ by what Misnomer. *Names of Baptism.*

And in assise
it was ad-
mitted that
it is a good
plea, that
where the
plaintiff is
named J.

1. **A**SSISE against *Isabel N.* it was taken as a good plea that *she had to name Elizabeth and not Isabel*; judgment of the writ, and because it was testified by several, therefore the writ was abated for this cause upon nient dedire of it; quod nota. Br. Misnomer, pl. 43. cites 20 Ass. 61.

in the assise, his name is R. Ibid. cites 28 Ass. 36.

2. Scire facias against three. One came and said that where he is named *John P.* his name is *Henry* and not John, and that he has nothing but jointly with *W. P.* not named, judgment of the writ; and the plaintiff confessed it and the writ abated, and so see Misnomer of name of baptism. Br. Misnomer, pl. 17. cites 47 E. 3. 14.

3. In assise by *Cicily D.* against two, the one pleaded a release of the plaintiff in bar, and the other pleaded that her name is *Julian* and not *Cicily*, and if &c. that his ancestor died seised, and he is in by descent; and all suffered; quod nota misnomer in proper person. Br. Misnomer, pl. 20. cites 11 H. 4. 26, 27.

4. The abbot of B. was indicted by name of *J. abbot of B.* of diverse trespasses, and came to the bar and was arraign'd, and said that he had to name *Roger* and not *John*, and the bishop of London

London testified it; by which the King's attorney would not further maintain for the King; by which * he went without day without inquiry of the trespass. Br. Misnomer, pl. 21. cites 11 H. 4. 41.

5. It seems that a man *cannot plead misnomer in his name of baptism*, but in his surname; for he may be *known by 2 surnames*; but only by one name of baptism. Br. Misnomer, pl. 2. cites 2 H. 6. 5.

6. A *bond* was entered into *by the name of John*, but in the condition for payment he was *named Robert*, and so was the name *subscribed*, and Robert was in truth his real name. Per Cur. There is a great difference between the case of a corporation and this case, *quia constat de persona*, and judgment was given for the plaintiff. Vid. Lutw. 894. and Comb. 40. Mich. 2 Jac. B. R. *Istead v. Clarke*.—But this judgment was afterwards reversed per tot. Cut. in the Exchequer Chamber. Lutw. 895. b. CLARK v. ISTEAD. And says the following Cases, which are strong and direct to the purpose, were cited in maintenance of the reversal, viz. D. 279. b. SHOTBOLT'S Case. Cro. E. 897. FIELD v. WINSLOW. Mo. 897. PANTON v. CHARLES. Ow. 48. [the Case of one LEUSAGE. Mich. 32 & 33 Eliz.] Cro. J. 558. WATKINS v. OLIVER. Ibid. 640. MABY v. SHEPHERD. 2 Brownl. 648. Sir Edw. Ashley's Case.

If the christian name be wholly mistaken; this is, regularly, *fatal* to all legal instruments, not only to declarations, but grants and obligations; also the reason is, because it is repugnant to the rules of christian religion, that

there should be two christian names; for that allows no re-baptizing; therefore you cannot declare against the party, but *by that name in the obligation, and bring in his true name by an alias*; for that supposes the possibility of two christian names, and you cannot declare against the party, and *aver that he made the deed by his wrong name*; for that is to set up an *averment contrary to the deed*; and there is that sanction allowed to every solemn contract, that it cannot be suppressed but by a thing of equal validity; and if he be impleaded by the name in the deed, he may plead that he is another person, and that 'tis not his deed. G. Hist. C. B. 174, 175. cap. 17.—And therefore if *Edward obliges himself by the name of Edmund*, it will [be fatal;] but tho' a person cannot have two christian names at one and the same time, yet they may, according to the institution of the church, *receive one name* at their baptizing *to make double names*, yet it doth force a man to abide by the name given him by his godfathers when he comes himself to make profession of religion. G. Hist. C. B. 175. cap. 17.

7. When there is a *sufficient expression and specification of parties*, whatever is *redundant* and over and above (like all other surplussage), though mistaken, *cannot hurt* and destroy the force of the grant, according to the rule *utile per inutile non vitiatur*; and therefore a grant to *George bishop of Norwich*, where his name is *John*, or to *Henry earl of Pembroke*, where his name is *Robert*, or to *Emmy the wife of J. S.* where her name is *Emelyn*, it doth not vitiate. But in pleading in these cases, *the Christian name ought to be shewn*; for the death of the individual is a good plea in abatement, which often falls out where the same office, dignity, or relation, continues in another. G. Hist. C. B. 175, 176. cap. 17.

(C. 7) Pleadings. *Known by the one Name and the other.*

1. *ENTRY*; supposing the entry to be by *W. and K. his feme*, and the tenant said that *she had to name J.* and the demandant said that *she is known by the one and by the other*; & non allocatur, but was compelled to maintain that *she had to name K.* Br. Misnomer, pl. 26. cites 21 E. 3. 47, 48.

2. Assise by *J. Will'* the defendant pleaded misnomer, that the name of the plaintiff is *J. Wood*, and found by the assise that *he is known by the one name and by the other*, and so the writ good; quod mirum ex parte querent. For the plaintiff shall not say for plea, that he himself is known by the one name and by the other, but where the defendant pleads misnomer of himself, the plaintiff may say that the defendant is known by the one name and by the other; but every man must take precise notice of his own name, as appears elsewhere. Br. Misnomer, pl. 42. cites 22 Ass. 1.

[415] 3. Scire facias was sued against the *Prior of Saint John's of Hierusalem* in England upon a recovery in waste which was *Prior of the Hospital of Saint John of Jerusalem* in England; and exception taken: per Thorp it is *known by the one name and the other*, and therefore answer; quod nota. Br. Misnomer, pl. 15. 44 E. 3. 16.

4. Scire facias against *W. S.* who said that *his name is W. C and not W. S.* Judgment of the writ, and this in proper person; Markham said known by the one and by the other; Prist; and the other e contra. Br. Misnomer, pl. 28. cites 19 H. 6. 2.

But where the defendant pleads misnomer of himself, it is a good plea 5. Trespass by the *Abbot of R.* the defendant said that the foundation is *Abbot of St. Peter of R.* and not *Abbot of R. only*; judgment of the writ, and the other e contra. Br. Misnomer, pl. 53. cites 1 E. 4. 6.

for the plaintiff to say that he is known by the one and by the other; for a man may be known by 20 names, and yet he has not but one name. Ibid.—But where the defendant pleads misnomer in the plaintiff, there, known by the one and by the other is no good plea for the plaintiff; for he ought to take consue of his own name; contra of the name of the defendant; for he is another person. Ibid.

6. The Master of *Burton Lazar* and his Confreres pleaded, that they were known, impleaded, and used to implead, as well by the name of *Master and Confreres of Burton Saint Lazar of Jerusalem in England of the Order of Saint Lazar*, as by the name of *Master and Confreres of the Hospital of Burton Lazar*; quod nota, that known by the one name and the other is a good plea; but it seems that they cannot take any grant, but by their true proper name. Br. Misnomer, pl. 37. cites 9 E. 4. 20.

7. In debt it was agreed clearly for law, that if misnomer be pleaded in a prior for variance of the name of the corporation, the other may say that known by the one and by the other. Br. Misnomer, pl. 85. cites 16 H. 7. 1.

(C. 8) Pleadings. *Where a different Person of the same Name appears, or is pleaded to be so.*

1. **I** T is said, that when there are two *J. S's* of one and the same vill, and the one is impleaded and not named elder or younger, and he who is impleaded appears, he shall not compel the plaintiff to put addition, but shall answer. Br. Additions, pl. 47. cites 39 H. 6. 46. *But if a stranger of the same name appears, he shall compel the plaintiff to put addition by his surmise, which shall be entered in the roll; quod nota diversify. Ibid.*

2. In *scire facias* against me another of the same name appears, the plaintiff may say that he is not the same person, and the other shall not have traverse to it, for he has advantage thereof; for this is a discharge to me in this action; per Danby &c. Br. Misnomer, pl. 56. cites 8 E. 4. 18. *If one appears who is not the defendant but is of the same name, there the plaintiff*

may say that there are two of the same name, and his suit is against the other and not against him who appears, and give addition, and process shall issue against the party with addition; quod nota; per Moile J. Br. Additions, pl. 12. cites 33 H. 6. 53, 54.

3. But per Moyle, if I bring an action against *W. T. taylor*, and *W. T. smith* appears, I may say that he who appears is *W. T. smith*, and not *W. T. taylor*. Ibid. *But if two W. T's taylor are, and he who is not sued appears, there I shall say, that W. T. taylor who appears is son of N. T. and the other against whom the action is brought is W. T. son of J. T. and so is not the same person. Ibid.*

(C. 9) Pleadings. Of the Place where.

[416]

See Abatement.—
Addition.

1. **I** N *præcipe* quod reddat of tenements in *Horsigh* the tenant pleaded a recovery of the same tenements in *Hoftrich*; and per Thorp it is a good plea; for the vill may be known by the one name and the other. Br. Misnomer, pl. 74. cites 39 E. 3.

2. In debt against *J. H. of D.* the defendant said by attorney, that there is *D* in *H.* and *D.* in *F.* and none without addition; and per Chaunt, attorney may well plead it; for it is not parcel of the name of his master; by which the other said, that there is a vill of *D.* in the same county without addition, Prist; and the other e contra. Br. Misnomer, pl. 76. cites 10 H. 6. 26.

3. Maintenance against *J. S. of P.* who said that he was never of *P.* without shewing of what vill he was, and a good plea; and yet exigent does not lie in this action; but this is a good plea of misnomer by the common law. Br. Misnomer, pl. 61. cites 11 H. 6. 11. *S. P. Br. Misnomer, pl. 77. cites S. C.*

4. In *replevin* of a taking in *Sale* the defendant shall not say, that the place is named *Dale*, and not *Sale*; for he shall not plead misnomer of the place, as he shall do of the place of which the defendant *A man cannot plead misnomer of the place.*

Br. Tra-
verse, per
&c. pl. 286.
cites 16
H. 7. 7. —

defendant is named in trespass; *but he may say in replevin that the taking was in another place, and not in the place in the writ.* Br. Misnomer, pl. 86. cites 16 H. 7. 5.

S. P. unless in action where process of outlawry lies. Br. Misnomer, pl. 64. cites 8 H. 6. 9.

5. *Affise* [of lands] in Middlesex was brought in C. B. and the writ was *de libero tenemento in C.* and the *plaint* was of a *mesuage*, 100 acres of land, 10 acres of meadow, 30 of pasture, and 10 of wood, with the appurtenances &c. And it was *pleaded*, that the *tenements* &c. were in H. and not in C. *Judgment of the writ*; and if &c. nul tort &c. *Quære* if he need to say, and not in C. in as much as the writ is only supposal, viz. *de libero tenemento.* D. 78. pl. 43. Mich. 6 E. 6. Charleton v. Saunders & al.

6. In *trespass in Holdernefs apud W.* the defendant (in respect of some misnomer) *pleaded* that there was *no such vill, hamlet, nor lieu conus* &c. The plaintiff *replied*, *Prist*, that there is, without shewing in certain, either that it is a vill, hamlet, or lieu conus, and this in detestation of nice and dilatory exceptions. 6 Rep. 64. b. 65. a. in Sir Moyle Finch's Case.

7. If the *plea* be of the manor of D. and the deed is of the manor of S. this is a material variance; for the manor of S. cannot be understood to be parcel of the manor of D. nor to be the manor of D. Jenk. 170. pl. 33.

(C. 10) Replication and Rejoinder.

1. **I**F A. gives bond by name of B. and he is afterwards sued by the name of B. he may plead misnomer, and the plaintiff may plead misnomer, and the other may reply, that he made the bond by the name of B. and estop him by demanding judgment if against his own deed, he shall be admitted to say that his name is A. and then he may *rejoin*, and say that he made no such deed; and this he must do without oyer; for if he prays oyer, he admits his name to be B. 1 Salk. 7. pl. 17. Mich. 3 Ann. B. R. cited as said per Cur. in another Case in the same Term.

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(D) Misnomer. Relieved in Equity.

Cro. E. 847. 1. **A** Misnomer was in a bond, [but it was ordered, that] no advantage be taken of it. Toth. 89. cites 11 May 33 Eliz. Colston v. Car.

[For more of Misnomer in general, see Abatement, Addition, Grants (B) &c. Names, and other proper Titles.]

Misrecital.

1. **I** F a thing is referred to * *time, place, and number*, and that is mistaken, all is void. Arg. Pl. C. 392. b. Trin. 13 Eliz. i Case of the Earl of Leicester v. Heydon.

* *Defiance* of a recognizance recited as made the

10th of November, where it was the 2d. is void. Per Archer J. Cart. 150. cites D. 50. b.

2. Misrecital in an *immaterial point*, and where it is only an additional flourishing in *things circumstantial* shall not avoid a grant; as where the husband has a term in right of his wife, and this term is recited as made to the husband. Per Archer J. Cart. 149. Mich. 18 Car. 2. C. B. in Case of Foot v. Berkley.

3. A misrecital in the *beginning of a deed*, which goes not to the end of a deed, shall not hurt, but if it goes to the end of a sentence, so that the deed is limited by it, it is vitious. Per Archer J. Cart. 149. in Case of Foot v. Berkley.

[For more of Misrecital in general, see Grants (R. 3) (R. 4) and other proper Titles.]

Mistake.

(A) Mistake of Time.

1. **I** T was pleaded that A. the husband of B. died the 20th of February 39 Eliz. and that afterwards, viz. the 21st of November, 39 Eliz. B. did marry C. so that the (*afterward*) is sufficient. Arg. Bridg. 45. Mich. 13 Jac. in Case of Smallman v. Agborrow.

2. *Summons* to appear Tuesday the 17th of April (where Friday was the 17th), before Justice of Peace, on a penal statute, the time being impossible it was as if no summons had been. 1 Salk. 181. Trin. 2 Ann. B. R. Queen v. Dyer.

(B) Mistake

(B) Mistake of Words.

1. **T**HE words of a deed were, that after the death &c. the tenements aforesaid *shall revert* instead of *remain* to J. S. yet it is a good remainder; because, as it seems, every one's deed shall be taken most strong against himself. Br. Faits, pl. 26. cites 21 E. 3. 49.

3 Bulf. 153.
S. C.—
Cro. J. 390.
Wood v.
Garnon.—
Mo. 848.

2. *Restrain* for *distrein*, if rent be arrear, not being limited to any thing which should be restrained; as on the cattle, or on the land, and so shall not be taken to mean *distrein*. Roll. R. 330. 367. Hill. 13. and Pasch. 14 Jac. B. R. Moody v. Garnon.

[For more of Mistake in general, see Grants, (D. 2) (Q) &c. Mistaking, and other proper Titles.]

Modo et Forma.

1. **M**ODO & forma are words used in pleading, and sometimes they are only formal, and sometimes they are material; these words *are mostly used in the answer of the defendant, whereby he denieth himself to have done the thing laid to his charge modo et forma declarata*. Reg. Plac. 92. cap. 2.

2. In debt by a servant against his master for his salary upon a *retainer*, it is a good plea, that he did not retain the servant in *husbandry*, and he shall not be compelled to say *non retinuit* generally; for it may be, he *retained him in other service, and not in husbandry*; but *non retinuit modo et forma* is a good plea; for this shall be referred to the declaration by these words modo et forma. Br. Labourers, pl. 46. cites 38 H. 6. 22.

Reg. Plac.
299. cap. 8.
—There
is another
diversity.
That *tho'*
the issue be
upon a colla-
teral point,
yet if by the
finding of
part of the
issue it shal

3. Where modo et forma are of the *substance* of the issue, and where but words of *form*, this *diversity* is to be observed; where the *issue taken goeth to the point of the writ or action*, there modo et forma are but words of form, as in the case of the writ of entry in casu proviso. But *otherwise* it is, when a *collateral point* is *pleading is traversed*; as if a feoffment be alleged by two, and this is traversed modo et forma, and it is found the feoffment of one, there modo et forma is material. So if a feoffment be pleaded by deed, and it is traversed absque hoc quod feoffavit modo et forma, upon this collateral issue modo et forma are so essential

essential as the jury cannot find a feoffment without deed. Co. Litt. 281. b. *appear to the Court that no such action lieth*

for the plaintiff, no more than if the whole had been found, there modo et forma are but words of form. Co. Litt. 281. b.

4. Modo et forma *do not put the day nor place in issue*; but only the matter and substance of the plea. Reg. Plac. 188. cap. 5:

5. Where a *traverse* is *with a modo et forma &c.* that *will put the manner*, as well as the matter *in issue*, *where the manner is material*, as the time, the fact, and other circumstances; when they are the effect of the issue, Reg. Plac. 189. cap. 5.

[For more of *Modo et Forma*, see *Master and Servant*, (U) pl. 10. *Trial* (C. g) pl. 53. &c. and other proper Titles.]

Moieties.

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(A) Moieties. *Grant.* In what Cases it shall *take Effect by Moieties.* *See Jointenants (R). — Baron and Feme. — Grant (G. a. 8.)*

1. **A** *Gift in tail to a brother and sister* are several estates; per Hobart, it ought to appear in the very deed of gift, that it is brother and sister, otherwise it is a joint tail, and the issue shall inherit and hold a formedon. Noy. 29. Hill. 15 Jac. C. B. in Case of *RENINGTON v. COLE*, cites 8 Rep. 87. 17 E. 3. 51. 18 E. 3. 39. 9 H. 6. 39. 22 E. 4. 18 E. 4. 29.

2. A. in consideration of service &c. gives land to B. his servant, and C. *his cousin in tail*. B. and C. had then an intention to intermarry and afterwards actually did. Adjudged, the gift being *before marriage*, they take by divided moieties. Noy. 122. *Ward v. Matthews*.—And says, it was so adjudged in the Court of Wards in *EDMUND's Case* on such a gift of a father to a son on an intention of marriage. Ibid.

3. Remainder in tail male, and for want of such issue, then to the use of *all the issue female of the body of the said A. by the said P. begotten*, and to the heirs of the body of such issue female &c. remainder to E. and the heirs of her body. A. and P. left issue 2 daughters, B. and C.—C. dies young. These sisters were jointenants

jointenants for life with several inheritances; so that a recovery passed by B. the survivor (who enjoy'd by survivorship 40 years) does not affect the moiety of C. which must remain to E. 5 Mod. 385. Hill. 9 W. 3. *Matthew v. Thompson*.

(B) *Entry &c. into a Moiety. Good, in what Cases.*

1. **I**N formedon it was agreed, that where my *villein and J. N. purchase jointly*, I may enter into the moiety of my *villein*; quod nota, that a man may enter into a moiety. Br. Entre Cong. pl. 15. cites 48 E. 3. 16.

2. And see there, that one *tenant in common* may have an *action of a moiety* against his companion. Br. Entre Cong. pl. 15. cites 48 E. 3. 16.

3. The rule of law is, that in all cases *when coparceners or jointenants may join in action*, and have one and the same remedy, there *if one be summoned and severed, and the other sues forth and recovers the moiety, the other may enter with her*. But when they are *driven to several actions, or where their remedies are not equal*, there *if one recovers, and continues the one moiety, the other cannot enter with her*; yet when both have recovered, they shall be coparceners again. 2 Inst. 308.

(C) Count and Pleadings.

1. **I**N assise, *plaint of the moiety of five acres of land* is a good *plaint where partition was made, that one parcener should have the one moiety, and the other parcener the other moiety,*
[420] *and in allowance of other land which was allotted to other of the coparceners, where there were four parceners in all, and good; the reason is, because partition was made by name of the moiety.* Br. Plaint, pl. 8. cites 7 Ass. 10.

[For more of *Moiety* in general, see *Baron and Feme, Grant*, and other proper titles.]

Money.

(A) *In what Cases it may be followed.*

1. **M**oney has *no ear-mark*, and cannot be followed when *invested in a purchase*; per Ld. Wright. 2 Vern. 441. Mich. 1702. in Case of Kendar v. Milward.—Cites it as the Case of KIRK v. WEBB, lately affirmed on appeal in Dom. Proc.

2 Vern. 480. Hill. 1704. S. P. Hooper v. Fyles and Rideout.—S. P. And

therefore if a *receiver of rents* should lay out all the money in a purchase, and afterwards die insolvent, yet a Court of Equity cannot charge or follow the land. 2 Wms's Rep. 414, 415. Trin. 1727. Per Ld. C. King, in Case of Deg v. Deg

So if an *executor* should realize all his testator's assets, and die insolvent. Ibid.

But where a person by his deed *owned the receipt* of the money, and that he had therewith purchased lands in D. and M. this was resolved by Ld. C. King to amount to a declaration of trust, and to raise a *specifick lien* on those estates. Ibid. Deg v. Deg.

(B) *Restitution in what Cases, and what Actions &c. lie for Money, as Trover, Detinue &c.*

1. **N**OTE, that 20d. was taken in the purse of a felon, who had stole 16s. Fairfax J. said, that one penny cannot be known from another, which Hufsey J. did not deny; nor did he deny, but that property in money cannot be known; so it seems, that a man shall not have *restitution* of money out of the hands of the sheriff; but Brook says, *tamen quære*; for it is said, that the * contrary is used in appeals, if the defendant be convicted. Br. Property, pl. 34. cites 22 E. 4. 19.

* S.P. That in appeal of money taken felonice, if the defendant be convicted, restitution shall be awarded, notwithstanding the

property be not known. Br. Restitution, pl. 22. cites 7 E. 6. Agreed in B. R. and C. B.—S. P. Tho' it cannot be known, yet *in odium spoliatoris*, and because in presumption of law the felon had no money but that which he stole, the appellant shall have restitution. And the like upon an indictment. Jenk. 207. pl. 39.

2. If money be delivered to be *re-delivered* when required; upon refusal *debt* lies. But if *Portugal &c.* money, that may be known, be delivered to be re-delivered; *detinue* lies. Owen. 86. Mich. 41 & 42 Eliz. Bretton v. Barnett.

3. *Trover* lies not of money received by servant for the master's use. Cro. El. 661. 746. Pasch. 41. and Hill. 42 Eliz. Holiday v. Hix.

But if the money was in a bag, it lies. Ibid. —Money

delivered by plaintiff to defendant to keep, tho' it be not in bags, trover lies for it; per Roll. Ch. J. Allen 91. Davis v. Dyos.

4. *Detinue* lies not for money number'd, nor a general action of *trespass de bonis & catallis asportatis*; for there is a special action of *trespass* for it in the register. Jenk. 207. 208. pl. 39.

It seems it is admitted, that a man may have property in money out of his purse, bag or chest. Br. Property, pl. 7. cites 34 H. 6. 10.

5. *Trover* and conversion was brought of divers things and inter alia of 190*l.* in *pecuniis numeratis*. Upon not guilty the plaintiff had a verdict, and intire damages in B. R. Whereupon error was brought in Cam. Scacc. and assigned, that trover and conversion cannot be of money out of a bag; but all the Justices and Barons agreed, that it well lies; for tho' it was *alleg'd*, that money lost cannot be known, and so whether it was the plaintiff's money whereof the trover and conversion was as the action charges, yet the Court said, that *it being found by a jury, that he converted the plaintiff's money* (for the losing is but a surmise, and not material, because the defendant might take it in the presence of the plaintiff or any other who might give sufficient evidence; and tho' he took it as a trespassor, yet the plaintiff may charge him in an action upon the case in a trover, if he will), *the plaintiff had good cause of action*, and so judgment was affirmed; and they said, that this action lies of money out of a bag, as of corn which cannot be known. Cro. C. 89. Mich. 3 Car. Kinaston v. Moor.

See Debt (U).

(C) Pleadings and Judgment.

Cro. E. 536. in Case of BAGSHAW v. PLAYN Arg. cites Hill. 32 Eliz. Rot. 637. between DAVIDGE and WYCHALLS where debt was brought for 20*l.* and declared upon sale of certain

1. A. Brought debt against B. and declared upon divers contracts, viz. *that he had sold to B. such merchandizes for so many portagues, and such other for so many ducats, which in the whole amounted to 700*l.* sterling, which sum he demanded in sterling money, and not in portagues and ducats according to the contract*; B. demurred upon the declaration, and the plaintiff had judgment; for it is in his election to demand his debt in which of those coins he pleased, either in the proper coin of the contract, or of sterling, viz. current money, and upon error brought in the Exchequer Chamber the judgment of B. R. was affirmed. Le. 41. pl. 52. Mich. 28 & 29 Eliz. Willshalge v. Davidge.

pitchards for 22*l.* Portugaliz, quæ attingunt ad valentiam 20*l.* legalis monetæ Angliæ; and upon a nihil dicit had judgment to recover the 20*l.*—The Case of BAGSHAW v. PLAYN was then, viz. The plaintiff declared against the defendant as executor to J. S. in debt upon an obligation, and demanded 40*l.* monetæ Flandriæ attingen. ad valentiam 40*l.* the defendant pleaded plene administravit and found against him and judgment thereupon, quod recuperet debitum prædictum. It was assigned for error, that it was not inquired by the jury upon taking the verdict, nor by writ to inquire, of the value of the money, and to give judgment accordingly; to which it was answered, that it was well enough, and the value shall be intended to be as in the declaration, and to that purpose cited a precedent in the Book of Entries fol. 157. and the said Case of DAVIDGE and WYCHALLS; but after much argument and debate all the Justices and Barons here held it to be error; for the value of Flemish money is not known to us here, any more than the value of 20 quarters of wheat &c. whereas the value is to be inquired, and to that purpose cited 11 H. 7. 5. and 9 E. 4. 49. which is the reason that the plaintiff in his declaration ought to express the value thereof; but of current money here, the value whereof is known, it needeth not, and therefore the judgment here ought to have been quod recuperet the 40*l.* Flemish money and a writ to have been awarded to inquire of the value thereof, and therefore as it is given, it is erroneous and for that reason was reversed. Cro. E. 536. Mich. 38 & 39 Eliz. in Cam. Scacc. Bagshaw v. Playn.—The plaintiff's affirming that the Flemish money

money amounted to 40*l.* is no warrant for the Court to adjudge upon it without finding the value by the jury. Mo. 704. Mich. 37 & 38 Eliz. in Cam. Scacc. *Plaine v. Bagshaw.*—But where debt was brought for 39*l.* and the count was of goods sold for 60*l.* Flemish which amount to 39*l.* English to be paid on request, and that the defendant, tho' often requested had not paid the 9*l.* and a verdict was for the plaintiff, it was moved in arrest of judgment, that the plaintiff ought to have demanded the sum according to the contract which was 60*l.* Flemish and to have shewn that it amounted to 39*l.* English; but per tot. Cur. non allocatur; for the debt ought to be demanded by a name known, and the Judges are not apprised of Flemish money; besides when the plaintiff has his judgment, he cannot have execution by such name; for the sheriff cannot know how to levy the money in Flemish, and likewise it is now made good by the verdict which has found the debt demanded, viz. 39*l.* but if the contract had been for so many ounces of Flemish money or for a mass of silver or gold, there it need not be demanded by the name of any certain sum, because it is no coin, nor is it usual in trade, or merchandize, but in such case the plaintiff should have writ of detinue and thereby recover the thing, or the value. Yelv. 80. Mich. 3 Jac. B. R. *Rastell v. Draper.*—S. C. and in much the same words. Brownl. 90.—Mo. 775. S. C.—S. C. Cro. J. 88. and tho' the Case of *BAGSHAW v. PLAYN* was urged, yet the Court gave judgment for the plaintiff; for they held no difference between an action brought by original writ and by bill; but in [422] both the plaintiff shall demand the sum according to the English money, and if he demands it otherwise than it is in truth, the defendant may therein plead in abatement, and so help himself. And the verdict having found that he owed so much as plaintiff demanded, there ought not to be any further inquiry of the value; wherefore it was adjudged for the plaintiff. Cro. J. 88. *Draper v. Rastall.* Noy. 13. S. C.

2. Money may be granted by the name of *bona*, but a declaration for money must be *pro pecuniis numeratis*. 2 Show. 133. Mich. 32 Car. 2. B. R. Anon.

3. In case upon four several promises there was a verdict for the plaintiff, and intire damages; it was moved in arrest of judgment, that one of the promises was ill laid, viz. that *whereas the defendant was indebted to him in 13*l.* 10*s.* for 9 guineas, he promised to pay &c.* and says not 9 guineas ad valorem &c. as he ought, the value being not ascertained by proclamation; and per Holt Ch. J. 1st. Any piece of money coined at the Mint is of value as it bears a proportion to other current money, and that without proclamation; the unit was the old piece, which was 20*s.* in King James the First's time, the unit was by proclamation raised 16*d.* which was the reason and occasion of the coin of guineas, and of their being 16*d.* short of the unit. 2dly. There are guineas of 40*s.* a piece and so we will intend these were, and that the plaintiff was satisfied the rest. 3dly. That it was not necessary to set forth the number of the guineas; for in an *indebitatus assumpsit* the consideration is only set forth to shew it was not a debt by bond, &c. 2 Salk. 446. Mich. 8 W. 3. B. R. *Dixon v. Willoughs.*

Where the declaration was of *centum nummos aureos Anglice guineas* Holt Ch. J. said that this was very uncertain; but had it been *centum pecias auri (vocat. guineas)* it had been well enough. 5 Mod. 7. Mich. 6 W. & M. in Case of *St. Leiger v. Pope.*

[For more of Money in general, see Bringing Money into Court, Land, Prerogative, and other proper Titles.]

See Descent.

(A) Monsters.

It was a child that had 4 legs and 4 arms and 2 heads and but one belly, where the 2 bodies were conjoined; the child died, and was embalmed to be kept for shew, but was ordered by Lord Chancellor to be buried in a week. *Ibid.*

1. **A** Monster shewn for money is a misdemeanor. 2 Chan. Cases 110. Trin. 34 Car. 2. *Harring v. Walrond.*

Mortdancestor.

(A) Statutes.

This act is but a declaration of the common law. 1. **M**agna Charta 9 H. 3. cap. 12. Assises of novel disseisin and mortdancestor shall be taken in their proper shires. 2 Inst. 134.

If the lord have the ward of the heir of his tenant, and when he cometh of full age, the guardian will not suffer him to enter into the land, the heir shall have an assise of mortdancestor against the guardian, by this statute. F. N. B. 196. (F).

2. *Marlbridge* 52 H. 3. cap. 16. If the lord will not render unto the heir his land (when he comes to age) without plea, the heir shall recover his land by assise of mortdancestor, together with all his damages.

[423] If the heir at his ancestor's death be at full age, and then seised of the inheritance, the lord shall not oust him, nor meddle with any thing there, but shall only take simple seisin thereof, that he may be known to be lord; and if the lord shall then put him oust, whereby he is driven to his writ of mortdancestor or cousinage, he shall recover his damages as in a writ of novel disseisin.

The King shall have primer seisin of lands holden in chief, as in times past; neither shall the heir, or any other intrude into the inheritance before he have received it out of the King's hands; as formerly hath been used.

This

This statute is to be understood of lands accustomed to be in the King's hands by reason of knight-service, serjeanty, or right of patronage.

3. Stat. of Gloucester 6 E. 1. cap. 6. *If * one die having † many heirs, ‡ of whom one is son or daughter, || brother or sister, nephew or niece, and the other be a farther degree off, all the heirs shall ** from henceforth †† recover by a writ of mortdancestor.*

This act was made in affirmance of the common law. 2 Inst. 307.

cites Bract. lib. 4. fol. 254. 283. Britt. 181. b. and Fleta lib. 5. cap. 2.—And as a further proof thereof Lord Coke says, that this act extends to dying seised after the statute, and yet the like joining shall be in the writ of mortdancestor, aiel, and besaiel of dying seised before the statute.

* *One right must descend from one ancestor*, or otherwise the case is not within this statute, [as] if two coparceners die seised, and a stranger abates, the aunt and the niece shall not join in a writ of mortdancestor, but shall have several writs [viz.] the one shall have a mortdancestor and the other a writ of aiel. 2 Inst. 308.—*So if two coparceners are disseised and one has issue and dies, the aunt and the niece shall not join; for they have several rights, and not one only, and therefore they must have several actions; but when they have recovered they shall hold in coparcenary.* 2 Inst. 308.

† The words (many, or divers heirs) extend either to heirs gavelkind by the custom, or heirs, female coparceners by the common law. 2 Inst. 308.

‡ It likewise appears by these words [of whom one is a son or daughter &c.] that this act extends as well to heirs by the custom, as to those by the common law; if the aunt and the niece bring a mortdancestor of the dying seised of the father, the aunt is summoned and severed, the niece shall proceed and recover the moiety (tho' she alone could never bring a writ of mortdancestor of the dying seised of the grandfather;) because the writ rightly and duly commenced; and when the niece has recover'd, the aunt may enter and enjoy that moiety with her. 2 Inst. 308.

|| These words (brother or sister, nephew or niece) imply the uncle and aunt, they being relatives, and then here are all the persons that may have an assise of mortdancestor; and in case there is one that may have an assise of mortdancestor, it matters not how remote the other is. 2 Inst. 308.

** By the words (from henceforth) this law extends to the future and not to the time past, and yet being made in affirmance of the common law, the same law that guides in futuro, rules also in præterito. 2 Inst. 308.

†† These words (recover by writ of mortdancestor) tho' general, have a special intendment; for as to the damages the aunt alone shall recover damages till the death of her husband, and both of them damages from the death of her sister according to the course of the common law. 2 Inst. 308, 309.

4. West. 2. 13 E. 1. cap. 20. *Whereas that Justices in a plea of mortdancestor have used to admit the answer of the tenant, that the plaintiff is not next heir of the same * ancestor, by whose death he demanded the land, and is ready to enquire the same by assise; it is agreed, † that in writs of cousinage, aiel and besaiel, ‡ which be of the same nature, his answer shall be admitted and inquired, || and according to the same inquisition, they shall proceed to judgment.*

The mischief before this statute was, that in the writs of aiel, besaiel and cousinage, the tenant was not admitted

to plead, that the demandant was not heir to him, upon whose dying seised the writ was conceived, but he must shew who was his next heir, which now by this act he need not to do, but yet he may plead the like plea as he might have done at the common law as he did in 6 E. 3. 2 Inst. 400.

* This antecessor in a writ of mortdancestor is intended of the father, mother, brother, sister, uncle, aunt, nephew, or niece of the demandant, and of no other. Ibid.

† But in the writs of aiel, besaiel, and cousinage, the trial of this issue is peremptory, and thereupon the Court shall proceed to judgment as here is expressed. Ibid.

‡ The difference between the assise of mortdancestor and these three præcipes appeareth by that which hath been said, and yet in some respect the words of this act (that they be ejusdem naturæ) are true. Ibid.—For as the writ of mortdancestor saith, Si O. pater P. cujus hæres ipse est, fuit seifitus in dominico suo ut de feodo de 20 acris terræ cum pertinen' in S. die quo obiit; so the words of the writ of aiel are, De quibus N. avus prædict. P. cujus hæres ipse est, fuit seifitus in dominico suo ut de feodo die quo obiit &c. Ibid.

|| Herein is the difference between this plea of mordaunc' and the other writs; for in the assise of mordaunc' the rest of the points of the writ shall be enquired. Ibid.—See (B).

(B) *Points of the Writ* ; and inquired in what Cases.

1. **I**N mortdanceſtor the *tenant vouched one who entered into the warranty*, and ſaid that the *ancestor did not die ſeiſed &c.* and notwithstanding this the aſſiſe was charged upon all the points of the writ ; quod nota. Mortdanceſtor, pl. 20. cites 9 Aſſ. 3.

But where they were at iſſue upon certain

points out of the writ which paſſed for the demandant, the aſſiſe was taken in right of damages without inquiring of any other points. Ibid.

2. In mortdanceſtor, the *tenant ſaid that the ancestor of the demandant did not die ſeiſed, Priſt,* and the others *e contra* ; and the aſſiſe was taken, and not charged upon this point but upon all the points of the writ. Br. Mortdanceſtor, pl. 21. cites 9 Aſſ. 14. and Itin. Derby accordingly.

3. Mortdanceſtor *againſt ſeveral who pleaded ſeverally*, and *one pleaded ſeveral tenancy*, and yet there the points of the writ were inquired as well as the plea to the writ. Br. Mortdanceſtor, pl. 35. cites 29 Aſſ. 10.

In mortdancer the tenant denied the point of the dying ſeiſed of the ancestor of the demandant only, and this was found for the demandant ; and the aſſiſe was further charged of the other 2 points and one, viz. that demandant

4. In mortdancer *againſt ſeveral tenants by ſeveral ſummons the one pleaded release with warranty of another ancestor in bar, which the demandant deny'd*, and the other *pleaded to the aſſiſe*, and by the aſſiſe it was found *not the deed of the ancestor*, and inquired over of all the points of the aſſiſe, which found that the ancestor did not die ſeiſed of any parcel, and the damages found of the parcel whereof the release is pleaded to 40s. and judgment of the parcel in the release given for the demandant, because the release was found false notwithstanding the verdict of the points of the writ ; for by all the Juſtices *as to this parcel of which release was pleaded they need not to inquire of the points of the writ ; otherwiſe it is upon counterplea of voucher, or plea in abatement of the writ* ; for if thoſe matters are found againſt the tenant, yet the points of the writ ſhall be inquir'd ; note the diverſity. Br. Mortdancer, pl. 46. cites 39. Aſſ. 13.

was next heir was found for him ; but the other againſt him, viz. that the ancestor died 50 years before the purchase of the writ. Dyer ſaid, he underſtood it for a principle in pleading in a mortdancer, that where the tenant in the land, or the tenant by warranty pleads a bar of the aſſiſe of mortdancer, as a matter of record, release, or collateral warranty, or the like, which is out of the three points of the aſſiſe, there if it paſſes with the demandant it is peremptory to the tenant ; but where it is pleaded in abatement of the writ, or voucher, and the voucher counter-pleaded by the demandant and thoſe pleas found for the demandant, yet all the points of the writ muſt be inquired and found for the demandant, or otherwiſe he ſhall not recover ; and he cited M. 2 E. 3. and M. 9 E. 3. and M. 10 H. 3. and 39 Aſſ. by good adviſement. And he ſaid, that here in the principal caſe no plea in bar was pleaded, and but one of the points only traversed, and this is no denial &c. of the other two ; but ſaid that by H. 33. E. 3. in Fitzh. Mortdancer, and by the opinion of Fitzh. Paſch. 37 H. 8. fol. 14. when one of the points is traversed the other ſhall be held as not denied ; for it is a bar as Fitzh. held it, which Dyer ſaid is not true, because he ſays not *quod aſſiſa non &c.* the which is the form of the bar in aſſiſe, and cited 8 Aſſ. 17. in mortdancer of a rent, where the pleading was *hors de ſon fee*, and found againſt him, and judgment there given without inquiring of the points of the writ ; but that 9 Aſſ. P. 3. where the tenant ſaid, that the ancestor did not die ſeiſed, yet the aſſiſe ſhall be charged upon all the points of the writ ; and he cited Bracton. lib. 4. cap. 9. *Si petens deſecit in uno articulo cadit aſſiſa mortdancer. ac ſi in omnibus deſecit.* D. 310. b. 311. a. pl. 82. Paſch. 14 Eliz. Repingale v. Cooke.—It is to be underſtood that when the tenant pleaded in bar of the aſſiſe, as matter of record, or a release, or warranty, or any other bar that is out of the ſaid three points of the aſſiſe, there the tenant beginneth his plea with *aſſiſa non &c.* 2 i there...

therefore the trial of that iſſue is peremptory, and the aſſiſe ſhall never inquire of any of the points of the writ; but when the tenant ſaith, that he is ready to hear the recognizance of the aſſiſe, he cannot ſay aſſiſa non; for that ſhould be repugnant to his own ſaying, and if he ſay that he is ready to hear the recognizance or the aſſiſe of one of the points of the writ, or traverse one of the points of the writ, yet the Court ex officio ought to inquire of them all; and ſo it is if the tenant plead in abatement of the writ, or vouch, and the demandant counterplead the voucher, and theſe pleas be tried, or adjudged for the demandant, yet the point of the writ ſhall be inquired, and ought to be found for the demandant, or elſe he ſhall not recover. 2 Inſt. 399.

5. If the *tenant pleads bar abſque hoc that the father of the demandant died ſeiſed*, and this be found againſt him, the points of the writ ſhall not be inquired, becauſe he has pleaded in bar; for upon bar they ſhall not be inquired; but if he pleads to the writ they ſhall be inquired clearly; per Fitzherbert J. Br. Mortdancer, pl. 1. cites 27 H. 8. 12.

And yet it was ſaid there, that in 9 E. 3. the tenant [425] pleaded that the anceſtor of the de-

mandant did not die ſeiſed, and the points of the writ were inquired. Ibid.—Brooke makes a *quære* if there be any difference where he ſays that he did not die ſeiſed, and where he pleads bar and traverses that he did not die ſeiſed &c. but ſays ſee elſewhere that the dying ſeiſed is not material, but if he was ſeiſed the day of his death, and ſo are the words of the writ. Ibid.

6. The points of the writ to be enquired are, according to the words of the writ, 1. Si W. pater præd' A. vel mater, ſoror, frater, avuncuſ' vel amita fuit ſeiſit. in dominico ſuo ut de feod' de uno meſuagio & una virgata terræ cum pertin' in N. die quo obiit. 2. Et ſi obiit poſt coronation' dom' H. regis, [or according to 2 Inſt. 399. Et ſi obiit infra 50 annos jam ultimo elapſos ante teſte brevis]. 3. Et ſi propinquior hæres ejus ſit. F.N.B. 195. (E) Theſe three points in this aſſiſe of mortdancer ſhall be inquired of by the recognitors of the aſſiſe, albeit the tenant make default, and no iſſue be joined thereupon; but it is not ſo in the writ of aiel, beſaiel, or couſinage, for they are no aſſiſes but writs of præcipe quod reddat, and therefore if default be made therein, judgment ſhall be given by default, as in other writs of præcipe quod reddat, without inquiry of any point of the writ: the three points of the aſſiſe are hypothetical, the demandant affirming nothing; and the words of the other three writs here mentioned are categorical, Præcipe A. quod juſte, &c. reddat B. unum meſſuagium &c. de quo W. avus prædict. B. cujus hæres ipſe eſt, fuit ſeiſitus in dominico ſuo ut de feodo die quo obiit; now, quod petens non eſt propinquior hæres, is a denial of one of the points of the writ of mortdancer. 2 Inſt. 399.

7. One point of the writ is to inquire, *whether the demandant be propinquior hæres* to his father. Pl. C. 239. b. in Caſe of Willon v. Lord Barkley.

(C) *Lies. In what Caſes, and of what.*

1. **I**N aſſiſe it was ſaid, that mortdancer was brought of the office of *bailiff of the foreſt* of P. Br. Mortdancer, pl. 17. cites 7 Aff. 12.

2. Mortdancer was brought of a *baillywick*. Br. Mortdancer, pl. 23. cites 10 Aff. 11.

3. Writ of mortdancer was of *two parts of the moiety of a mill*, and the writ awarded good, the mill being at the time not ſever'd but remaining per my & per tout undivided. 11 Aff. 20.

4. Mortdancer was brought of a *rent-charge*. Br. Mortdancer, pl. 53. cites 11 Aff. 29.

M m 3

5. A man

5. A man may have assise of mortdancestor in right of damages. Br. Mortdancestor, pl. 36. cites 29 Aff. 11.

6. Mortdancestor against J. who vouch'd to warranty [B], who at the summons ad warrantizandum was essoign'd, and at the day was essoign'd de servitio regis, and at the day failed of his warrant of essoin, and at the same day the tenant was essoign'd de servitio regis, and the demandant pray'd the assise by default of the vouchee for failure of warranty, and could not have it; for none is party to the assise but the tenant, till the vouchee had warranted to the tenant, and the demandant shall not have the assise by default where the tenant is essoign'd; by which the assise was adjudged and adjourned. Br. Mortdancestor, pl. 4. cites 45 E. 3. 24.

In such case the infant might have had such writ at his full age at the common law, notwithstanding the possession of the guardian. 2 Inst. 134.

7. In dower it was said, that if the guardian loses in dower as tenant, or as vouchee where the heir is vouch'd in his ward, and she recovers where she has not title there the infant shall have mortdancestor at his full age; and this seems to be good reason, because the infant is not party to the recovery, and faint recovery shall not void mesne estates. Br. Mortdancestor, pl. 5. cites 46 E. 3. 19, 20.

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Br. Scire Facias, pl. 77. cites S. C.

8. Scire facias upon a fine levied sur consueance de droit come ceo &c. to the baron and feme, and to the heirs of the baron who died; per Hill the heir of the baron shall have mortdancestor clearly, and Thirn. and Culpeper agreed to it, because such nature of fine is executed; but it did not appear if the feme surviv'd or not; but per Thirn. and Culpeper, all is one. Br. Mortdancestor, pl. 7. cites 11 H. 4. 55.

9. It was said that where a man leases land for life rendring rent and dies, the heir shall not have mortdancestor of the rent; for the ancestor had not fee simple in it; contra upon gift in tail and rent reserved. Br. Mortdancestor, pl. 9. cites 7 H. 6. 3.

S. P. Tho' the statute of Gloucester, 6 E. 1. cap. 2. mentions only father, cousin, grandfather or great-grandfather.

10. The writ of mortdancestor lieth where my father or mother, brother or sister, or uncle, or aunt, or nephew, or niece dieth seised of any lands, tenements or rents, or of a corody or other rents, as hens or capons issuing out of other lands of an estate of fee-simple: now if a stranger after their deaths abate in that land, rent or profits, I who am his heir shall have this writ of assise of mortdancestor. F. N. B. 195. (C).

For all are in equal mischief, and therefore within the same remedy. 2 Inst. 191.

11. And if the ancestor were seised the day that he died, of any lands or rents, or other like things of an estate in fee-simple, altho' that a stranger entreth and disseiseth him of that land or tenements the day that he dieth, so that he dieth not seised of the same land or rents &c. yet I who am his heir shall have that assise of mortdancestor, because the writ doth not suppose that any ancestor died seised, but the writ saith, Parati sacramento recogn. si W. pater &c. fuit seisitus in dominico suo ut de feodo die quo obiit &c. and the same is sufficient, altho' he dieth not seised; and the form of the writ is such. F. N. B. 195. (D).

12. If

12. If one has a *corody* to him and his heirs, and dies seised, or was seised the day of his death, his heir shall have assise of mortdancestor, if it be taken from him. F. N. B. 196. (B).

(C. 2) Lies. Of what Seisin.

1. IF there are grandfather, father and son, and the grandfather dies seised, and after the father dies, and the son endows the grandmother, and she dies, and a stranger abates, the son shall not have mortdancestor of the seisin of his father; for his seisin was defeated by the endowment of the grandmother, and she is in by the grandfather; per Wiche. which Kirton, Finch. and Mowbray deny'd; and yet Finch. and Mowbray granted that by the endowment of the grandmother every mesne estate was defeated, and therefore the law is with Wiche. as it seems. Br. Mortdancestor, pl. 3. cites 45 E. 3. 13.

2. Where the issue enters and endows his mother and after dies without issue, and after the tenant in dower dies, and a stranger abates, the uncle of the issue shall have mortdancestor upon the seisin of the brother who was father of the issue, and not upon the possession of the issue; for by the endowment the seisin of the issue was defeated; per Culpeper; quod nemo negavit; and so see the last seisin avoided; quod nota bene. Br. Mortdancestor, pl. 6. cites 11 H. 4. 11.

3. If one dies in pilgrimage beyond sea, his heir shall have a writ of mortdancestor; and in such writ it sufficeth if he were seised the day he went out of England, tho' it was not the day of his death. F. N. B. 196. (A).

4. If the father enters into religion and is profess'd, the son shall have a mortdancestor, if a stranger abate in the land. F. N. B. 196. (A).

5. If a man be seised in tail, the remainder to his right heirs, and afterwards he dies seised without issue of his body, and a stranger abateth, it is a question if the heir shall have an assise of mortdancestor. And says An. 21 E. 3. Itin. Suff. M. 5 H. 4. the opinion of some was, that if the remainder be to his right heirs, that then he shall not have an assise of mortdancestor; but if a gift in tail be made unto one, the remainder to him and his right heirs, that then he shall have an assise of mortdancestor, because he hath the remainder in fee to him and his heirs; but it seemeth he shall not have an assise of mortdancestor in the one case, nor in the other; for the words of the writ are, Si W. pater &c. fuit seisitus die quo obiit in dominico suo ut de feodo; and here he was not; for he was seised in demesne ut de feodo taliato, and not in demesne as of fee; and therefore the jury cannot find that he was seised in his demesne as of fee; for of the demesne he was seised in tail. Quære of that. F. N. B. 196. (K).

(D) Lies. *Against whom, and by whom.*

1. **W**HERE a man holds two acres of his lord for certain rent, and gives the one in tail, yet he remains tenant to the lord of both acres, and the writ well brought against him without naming the tenant in tail. Br. Mortdancestor, pl. 19. cites 8 Aff. 35.

Br. Tail &
Dones, pl.
19. cites
S. C.

2. Assise; if the donee in tail has issue, he may alien, and if he dies seised his heir shall have mortdancestor; for this is fee-simple conditional; per Green; but per Hufley, the heir collateral shall not have mortdancestor in this case. Br. Mortdancestor, pl. 31. cites 18 Aff. 5.

3. None is abator, but he who first enters by tort upon a descent; but yet assise of mortdancestor lies against the heir or scoffee of the abator, or against the 20th heir. Br. Mortdancestor, pl. 61. cites 5 H. 7. 6. per Keble.

4. If two purchase jointly to them, and to the heirs of the one, and he who has fee dies, and after the other dies, the heir of the first shall not have mortdancestor; and the reason seems to be inasmuch as the fee was not executed in possession by reason of the survivor of the other; and in effect, it is now only a descent of a reversion, and the feme of him who had fee shall not have dower; and yet he might have forfeited the fee-simple, or given it by feoffment, and joined the wife in writ of right; for he in reversion and the tenant for life may do it; quære if he may release it. Br. Mortdancestor, pl. 59. cites 29 H. 8.

Put if the
writ be in
common

form, it shall abate. F. N. B. 195, 196. (H.) in the notes there (c).

And H. 13
E. 2. It was
adjudged ac-
cordingly,
where the
younger

brother recovered in assise of mortdancestor, where the eldest went beyond the seas, and was alive. Ibid.— If my younger brother enters after the death of my father, I shall (not) have a mortdancestor against him, nor any other action but entry; and if he disturb me, I may have an assise. F. N. B. 196. (L) in the notes there (a).

7. The aunt and niece shall join in assise of mortdancestor, and that is by the statute of Gloucester, cap. 6. F. N. B. 195. (H).

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And so in
gavelkind,
one brother
shall not
have a mort-
dancestor

8. A mortdancestor doth not lie for lands devisable by will, because the title may fall to another, who is not heir, by the will of the ancestor &c. and yet the writ is true, that he was seised the day he died; quod vide 23 E. 3. Lib. Aff. F. N. B. 196. (I).

9. And if the ancestor dieth seised, and hath two sisters his heirs, one of them shall not have an assise of mortdancestor against the other; for this writ lieth against strangers, and not against privies in blood. F. N. B. 196. (L).

against the other for the privy of blood, but he ought to sue a nuper obiit against his brother, or one sister against the other &c. Ibid.

10. By

10. By the purview of the statute of *West. 2. 13 E. 1. cap. 4.* If the wife, having no right to be endowed, brings a writ of dower against the guardian in chivalry, and by favour the guardian in chivalry do yield dower, or make default or plead faintly, by means whereof the wife recovereth her dower in prejudice of the heir, the heir after he cometh to his full age shall have a writ of mortdancestor against the wife, as he might have against the other deforceour. 2 Inst. 352.

11. If A. had issue B. a son, and his feme died, and after he took another wife, and land was given to A. and his second wife, and the heirs of their two bodies begotten, and they had issue C. another son, and the feme died, and then A. died, and a stranger abated; in such case, C. the son before the statute de donis could not have had mortdancestor. For one point of the writ is to enquire if the demandant be propinquior hæres to his father, and this C. is not, but B. his eldest brother is next heir, and so should have had formedon in descender, which was a writ founded upon his case. Pl. C. 239. b.

12. If A. be tenant for life, remainder to B. for years, remainder to A. in fee, who dies seised, and a stranger abates, the heir shall have mortdancestor; per Powel J. Lutw. 733. Trin. 8 W. 3. in Case of Bates v. Bates,

(E) Lies. In what County or Place.

1. Mortdancestor was brought in C. B. of land in another county; Laicon demanded judgment if the Court will take conusance; for the statute of * *Magna Charta cap. 12.* is, that assise shall not be taken but in its county, and the statute speaks as well of assise of novel disseisin as of assise of mortdancestor; quod nota; but per Copley prothonotary, a man may bring this action & juris utrum in Bank if he will, or in the proper county at his election. But the law is contrary as it seems; for the statute is in the negative. And after, per Cur. if the statute be in the negative, the Bank shall not hold plea; and see the statute; for it is in the negative. Br. Mortdancestor, pl. 22. cites 38 H. 6. 18.—And see S. P. 39 H. 6. 19. where it was awarded per Prisot, that the defendant go fine die, nota. Ibid.

2. But if assise of mortdancestor be brought in the same county where C. B. sits it shall be returned in the same Bank. Br. Mortdancestor, pl. 60. cites the Register, fol. 196. F.N.B. 177. (B) (C).

3. And if B. R. sits in another county than where C. B. sits, then the assise of mortdancestor of land in this county where B. R. sits shall be * returned in the same B. R. Ibid. F.N.B. 177. (B) (C) * Orig. (re-cov').

4. And so see if any of the Banks are in the county where the mortdancestor is to be brought, this shall be returned in the Bank; but if both the Banks are in one and the same county, then it shall F.N.B. 177. (B) (C) says, that mortdan-

ceſtor ſhall
be brought
in like man-
ner as the

ſhall be brought in C. B. for this is a common plea as it ſeems,
and ſo of aſſiſe of novel diſſeiſin. Ibid.

aſſiſe of novel diſſeiſin ſhall be before the Juſtices of C. B. or B. R. and in (B) ſays, that if both the
Benches are in one county, the uſage is to bring the aſſiſe of novel diſſeiſin in the C. B. or B. R. at
pleaſure, but that, he thinks, is againſt the rule in the regiſter.

(F) Writ. And Proceedings.

1. **M**ortdanceſtor *againſt ſeveral by ſeveral ſummons's, and all
vouched to warranty ſeverally, and all the vouchers granted
for term of life, which was counter-pleaded that none &c. by the
ſtatute; and the demandant prayed that it be tried by the aſſiſe,
which the Court denied; for they ſaid, that they would not take
the aſſiſe by parcels notwithstanding the ſeveral ſummons's. Br.
Mortdanceſtor, pl. 22. cites 10 Aſſ. pl. 3. and pl. 17. accordingly,
but contra in itinere North.*

2. In mortdanceſtor the writ was of 3 meſuages, 40 acres of
land, 10 acres of meadow, 10s. rent, and of two parts of a meſuage,
and of two parts of a moiety of a mill, &c. And in the clause of
Et interim, &c. the writ was Meſuag' pred' terras prat' mo-
lend'; but neither the two parts of the meſuage, nor the two parts
of the moiety of the mill were put in view; & non allocatur; for
the form of the Chancery is to put the whole in view notwithſtand-
ing that parcel only be in demand; and after it was challenged
becauſe he demanded two parts of the moiety of the mill, which is
the third part of the whole, and ſo ſhall be demanded, & non
allocatur. Br. Faux Latin &c. pl. 67. cites 11 Aſſ. 20.

3. *Commiſſion to take aſſiſes extends as well to mortdanceſtor as
other aſſiſes, and ſo of aſſociation, and where the one is put with-
out day the other is likewise, and when the one is put to re-
attachment, the other is put to re-ſummons; but note, that at this
day the commiſſions make expreſs mention of aſſiſe of mortdanc-
ceſtor. Br. Mortdanceſtor, pl. 55. cites 12 Aſſ. 2.*

4. Writ of mortdanceſtor was Si J. obiit ſeiſitus de octo pedibus
terrae in longitudine & ſex pedibus in latitudine & duabus partibus
unius meſuagii, & de medietate duarum partium unius meſuagii
in villa de D. & interim meſuagia & terras tenementa videant &c.
And the writ was challenged, becauſe it was de octo pedibus terra
&c. where it ſhould be of a place containing octo pedes &c. & non
allocatur; and it was challenged, becauſe the land was in villa
D. and the viſne was demanded de villa de D. & non allocatur;
for in villa & de villa is all one; and it was alſo challenged, be-
cauſe land was demanded before meſuage, & non allocatur; for a
thing intire ſhall be demanded before a thing parted; and note,
that two villis oftentimes ſhall be intended one and the ſame
thing, and the reaſon that in the clause of the view, the meſuage
was before the land, which was intire, was, becauſe where part
of a meſuage is in demand, yet the whole meſuage ſhall be put in
view.

view, and a man cannot have writ of other form; quod nota bene. Br. Faux Latin &c. pl. 117. cites 16 E. 3. & F. N. B. tit. Mortdancestor.

5. In mortdancestor in Pais by divers summons's the tenant as to one summons vouched in the same county, which was counterpleaded by the statute, and to another he prayed aid, and to the third he vouched foreign, and the voucher granted; and because assise cannot be taken by parcels all was adjourned into Bank, and he who prayed aid made default, by which the assise was awarded against him; and as to him who vouched in a foreign county, the vouchee warranted him and entered into the warranty and vouched over, and the second vouchee came and demanded the lien, and the other shewed [430] deed of his ancestor, bearing date where the tenements lay, and the second vouchee denied it, and they were at issue. And per Green, all those issues shall be tried by the assise in Pais; but per Shard, assise shall not be taken by parcels, and this issue of the deed denied is out of the point of the assise, and triable by inquest, and neither the demandant nor the tenant are parties, but the two vouchees, by which this inquest shall be first taken and tried here, & concordat in juris utrum M. 17 E. 3. contra H. 10. E. 3. where it is said, that assise of mortdancestor and juris utrum may and ought to be taken by parcels, and in such case H. 9. E. 3. the assise after such issue tried was taken of damages. Br. Mortdancestor, pl. 30. cites 17 Aff. 9.

6. Mortdancestor against an infant, who pleaded [that for] estoppel which was no estoppel, and because the tenant was an infant, the assise was awarded at large, and re-summons awarded as well against the jury as the party, and at the day the tenant cast essoign which was quashed by award, and the assise remained for default of jurors, and at the next sessions the Justices did not come, by which re-summons was sued, and the tenant was essoigned, and this was adjudged and adjourned; for this re-summons is to revive the plea, and the other was only mesne process. Br. Mortdancestor, pl. 41. cites 30 Aff. 46. 51.

7. In assise the writ was post primam traffretationem where it should be transfretationem scil' (f) for (ns) & nomina eorum inbrevari for imbrevari scil' (n) for (m) and passed for the plaintiff, and those matters alleged in arrest of judgment, and yet it appeared by the title of the plaintiff, that this was done in the time of R. II. so that it appears that it was after the limitation, and yet the plaintiff recovered. Br. Faux Latin &c. pl. 22. cites 13 H. 4. 17.

8. And per Hank. where those words in assise of mortdancestor (*propinquior heres ejus sit*) are omitted, the writ shall abate; for it wants matter. Ibid.

9. But fretationem suffices without (trans) & inbrevari & imbrevari are all one, and therefore well and no jeofail. Ibid.

10. If the heir brings assise within age, he shall not find pledges, and the writ shall not say, *Si A. fecerit te securum &c. nor Si obiit* But if many sisters are demandants, post

and some are *post coronationem* &c. because it appears by the demandant's age, within age, F. N. B. 195. (H) and some of full age,

then the writ shall be in the common form, as if all were of full age. F. N. B. 195 (H).—Ibid. in the notes there (b) cites 13 E. 3. pl. 677. 9 E. 2. Brief, 852.

11. The order of setting the parcels in the writ shall be as in a writ of right. F. N. B. 196. (C).

12. A man shall have a *certificate* upon this writ, and also writs of association, & si non omnes, as he shall have in assise of novel disseisin. F. N. B. 196. (D).

13. The process in mortdancestor is *summons* against the party, and if he make *default* at the day of the assise return'd, then the plaintiff ought to sue a *re-summons*; and if he make default again, the assise shall be taken by his default. F. N. B. 196. (G).

Where the tenant vouched a foreigner in order to re-

14. And if a man vouch in assise of mortdancestor, and at the first day the vouchee make *default*, then the *re-summons* shall issue forth against him. Ibid.

move the plea, and the vouchee was returned summoned, and made default, the *re-summons* was remanded. F. N. B. 196. (G) in the notes there (a) cites 3 Aff. 10. 28 Aff. 29.

* S. P. And no re-summons was awarded against the vouchee, as it should be in the mortdancestor against the tenant himself; quod nota. Br. Process, pl. 92. cites 3 Aff. 10.

The tenant was effoign'd at the day, and afterwards made

15. And so if the tenant or vouchee at the first day be *effoign'd*, and afterwards at the day given by the effoign, the tenant or vouchee make *default*, a re-summons shall be awarded. Ibid.

[431] default, * no re-summons was, but the jury taken by default. 10 E. 3. 7. 45 E. 3. 17. 4 H. 6. 23. 18 E. 4. 8. Note, it was a *common effoign*, yet see † 8 Aff. 13. a re-summons granted, and see 22 Aff. 79. F. N. B. 196. (G) in the notes there (b).

* S. P. For re-summons does not lie but immediately upon the default at the summons. Br. Mortdancestor, pl. 11. cites 4 H. 6. 23.

† Br. Mortdancestor, pl. 18. cites S. C. accordingly. But Brook says, Note that the *effoign* is not any appearance, and so nota bene.

16. But if the tenant at the first day be effoign'd as in the King's service, and afterwards make default at another day, the assise shall be taken by his default &c. Ibid.

(G) Pleadings.

1. Mortdancestor was brought of a *bailiwick* without saying in *dominico suo* &c. upon which the writ was challenged, and also that assise is not given but by statute of such a thing; for it was not accounted franktenement at common law, but it was said there that this is not the cause, and that nuper obiit has been seen of a corody de libero tenemento. Br. Mortdancestor, pl. 23. cites 10 Aff. 11.

2. Mortdancestor was brought of a *rent-charge*, and the assise was taken without shewing thereof any deed or specialty; quod nota. Br. Mortdancestor, pl. 53, cites 11 Aff. 29.

3. Mort-

3. Mortdancestor of meadow and of rent; as to the meadow the tenant said that the demandant himself leased to him for term of life; this is a good bar without saying that it was after the death of the ancestor, and without shewing specialty, &c. The demandant said, that after the death of his ancestor the tenant had nothing of his lease; & non allocatur, unless he confess'd the demise, and that his ancestor died seised after; and as to the rent said that hors de son fee &c. Judgment, if without shewing title &c. & non allocatur; because the defendant was tenant of the rent and not tenant of the land out of which &c. Br. Mortdancestor, pl. 29. cites 12 Aff. 38.

4. In mortdancestor the tenant disclaimed by attorney and well; and per Hufsey it is no plea, * that the writ bore date before the last sessions in the county which was not arraign'd; judgment of the writ; but Brooke makes a quære. Br. Mortdancestor, pl. 54. cites 12 Aff. 25.

* All the editions of Brooke are (car le br^e port date devant le dar^e sessions en-count' quel

il ne fuit arraigne &c.) but the year book is as here, but it is 22 Aff. 25. the 12 Aff. 25. being another point, and so all the editions mis-printed.

5. In mortdancestor the tenant vouch'd and pray'd that he be summoned in another county, the demandant counterpleaded the general counterplea, and the assize awarded and found for the tenant, by which it was awarded that the voucher stand. The demandant said that the vouchee has assets in this county, and pray'd that he be summoned in this county, and could not have it, by reason of the issue above found against him. Br. Mortdancestor, pl. 45. cites 36 Aff. 6.

6. In mortdancestor the tenant said that J. N. was seised in fee, and the land is devisable &c. and that she devised to the defendant in fee and dy'd, and he enter'd; this is a good plea without shewing the testament; for this belongs to the executors; quod nota bene. Br. Mortdancestor, pl. 57. cites 40 Aff. 2.

7. In assize it was said, that in mortdancestor by an infant he need not make mention that the ancestor died after the limitation; per Grey; for it appears by the age of the infant; Norton said this is true where it is brought upon the seisin of the father or mother, contra where it is brought upon the possession of another ancestor; and it was agreed where those words propinquior heres ejus sit are omitted in assize of mortdancestor, that the writ shall abate; for it wants matter. Br. Mortdancestor, pl. 8. cites 12 H. 4. 26. & 13 H. 4. 17.

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8. Where an abatement is alleged, the entry in the roll is no other, but quod pred' tenens se intrusit; per Littleton J. quod nullus negavit. Br. Montdancestor, pl. 10. cites 15 E. 4. 22.

(H) Plea good; what is; in Abatement or in Bar.

1. A. and B. brought mortdancestor of the seisin of E. uncle to one and cousin to the other, and was compelled to shew how uncle and how cousin; and it was pleaded in bar by the next of

of blood, and bastardy was alleged e contra ; and it was awarded that bastardy tho' it be in the right, is *a good plea in action possessory*, as here. Br. Mortdancestor, pl. 13. cites 1 Aff. 15. & H. E. 3. accordingly in Writ de Aiel.

2. In mortdancestor *last seisin was alleged in the demandant as of fee, and of right, in abatement of the writ*, and it is sufficient without shewing how he came to it, and well ; by which the demandant shew'd that it was by disseisin to the tenant, upon which the tenant recovered against him in assise, and the tenant could not deny it, and therefore the assise was taken, quod nota ; and note that last seisin in writ of possession without title is to the writ, and by title is to the action in every writ but in writ of right. Br. Mortdancestor, pl. 16. cites 5 Aff. 1.

3. In assise it was said that mortdancestor was brought of the office of bailiff of the forest of P. *without saying in the writ cum pertinentiis*, and the writ awarded good ; quod nota of an office, and without cum pertinentiis. Br. Mortdancestor, pl. 17. cites 7 Aff. 12.

4. In mortdancestor of rent against two the *one pleaded hors de son fee and the other ancient demesne*, and all found for the plaintiff, by which he recover'd ; and so see ancient demesne try'd per patriam, as it seems there, without taking the assise upon the points of the writ. Br. Mortdancestor, pl. 19. cites 8 Aff. 35. & 10 E. 3. & M. 9 E. 2. accordingly.

5. In mortdancestor *by two of the seisin of A. father to the one and grandfather to the other the cousin was nonsuited and summoned and severed, and after was vouch'd to warranty, and enter'd into the warranty and said, that those tenements and others were in the seisin of the common ancestor, who gave those tenements to the mother of the tenant by the warranty, and of other tenements dy'd seised in fee, which descended to his sister and another daughter, and did not shew other name, and that those tenements were put in hotchpot with other tenements, and partition was made between them of the whole, so that these tenements and others were allotted to his mother in allowance of others allotted to another sister, and pray'd aid of her. And the assise was taken because he shew'd that the ancestor did not die seised ; and it was said that the plea was in bar of the action, and so it cannot be taken for cause to have the aid per Cur. And after the tenant pleaded in bar of assise, and the demandant was put to answer to it notwithstanding the demise of the common ancestor ; for when the tenements are put in hotchpot between other parties, they are become in the same course as other tenements of which the common ancestor died seised. Br. Mortdancestor, pl. 24. cites 10 Aff. 14.*

6. In mortdancestor the *tenant vouch'd, the voucher made default, which was recorded, and the demandant pray'd the assise ; and by award he shall only have re-summons ; and so in attaint the tenant said quod assisa non ; for my father leased to you for term of life and dy'd, and you surrendered to me because the land was not of as great value as the rent reserved upon the lease ; and held a good bar, and the other travers'd the surrender. Brooke says he wonders at this*

this pleading; for if the plaintiff had only for term of life he could not upon this title have assise of mortdancetor; but he says it seems that the book is ill reported, and that it ought to be two * cases, and that this bar is in assise of novel disseisin as bar and title. Br. Mortdancetor, pl. 34. cites 28 Aff. 29.

7. In mortdancetor *against the baron and feme and S. the baron disclaim'd for him and his feme, and S. vouch'd to warranty the baron, who came and pleaded recovery in * dum fuit infra etatem by himself against one S. and the estate of the ancestor of the demandant mesne between the title and the recovery; and the truth was that the baron recovered against S. named in the action of mortdancetor, pending the action of mortdancetor, by action try'd; to which the demandant said that the vouchee after the death of his ancestor enfeoffed S. with warranty, of which estate he was seised at the time of the recovery had, and so the recovery false and faint in law; and the vouchee demurr'd upon the plea, by which the demandant released his damages and pray'd seisin of the land, and had it per judicium; because by this plea and demurrer all the points of the writ were confess'd, and not per visum juratorum; because the † demand is comprised in the writ in certain; quod nota; upon which tho' the baron recover'd by elder title, yet the ancestor of the demandant died seised, and then the demandant ought to recover by this action possessory, tho' the said S. feoffee of the baron had the better right. Br. Mortdancetor, pl. 38. cites 30 Aff. 10.*

* Orig. (done fait).

† Orig. (demandant.)

8. Assise of mortdancetor in B. R. by one within age was challenged because the writ was *Si talis fecerit &c. tunc sum &c.* and those words (*si fecerit*) should be left out, inasmuch as the plaintiff was within age, and therefore shall not find surety by which to be summoned &c. And also inasmuch as the writ was *Si obiit post coron. &c.* which clause should not be in the writ; because it appears to the Court by the nonage &c. And notwithstanding the two challenges the writ was awarded good. By which it was said that the prioress of St. Elin leased to him against whom &c. for term of 300 years, so she is tenant of the franktenement, judgment &c. Et protulit factum &c. and of the rent [pleaded] feoffment with warranty of the same ancestor &c. and the demandant pray'd the assise and had it. 30 Aff. 25.

Br. Mortdancetor, pl. 39. cites S. C.

9. In mortdancetor deed of the same ancestor was pleaded in bar of a gift in tail saving the reversion, and it was adjudged no plea; but per Thorp otherwise it is of a lease for term of life, the reversion &c. Br. Mortdancetor, pl. 40. cites 30 Aff. 33.

10. In mortdancetor the defendant said that the prior of E. was seised in fee and leased the same land to the ancestor of the demandant for 300 years of whose seisin he demanded, and after the lessee reciting this grant granted the same land to the defendant, which term yet continues, judgment if assise; and a good bar; for the grant of the ancestor shall bind the heir till he shews how his ancestor came to the fee; and it is admitted there that the 300 years make only a chattel and no franktenement. And it is a good bar in this action that the ancestor of the demandant leased to the tenant

So if he pleads that his ancestor or himself leased to the demandant for 10 years, judgment if without title shewn &c. this is a good bar. Ibid.

for 40 years, which term yet continues, inasmuch as the tenant affirms the franktenement in the demandant; and the opinion of the Court was that the demandant shall answer to the deed of his ancestor. Br. Mortdanceſtor, pl. 42. cites 32 Aff. 6.

11. Mortdanceſtor of the ſeiſin of J. the tenant ſaid that H. father of the demandant, whoſe heir &c. by teſtament, which he ſhew'd, devis'd it (and ſhewed the cuſtom to deviſe &c.) to A. his ſon for term of life, the remainder to the ſaid J. in tail, and for default of iſſue of J. that his executors ſhould ſell it and diſtribute &c. and the deviſor died and after A. died and J. entered and died ſeiſed without iſſue, by which the executors ſold to the tenant, judgment if aſſiſe; and a good bar. Br. Mortdanceſtor, pl. 44. cites 35 Aff. 1.

* Orig. (il demitta &c.)

12. In aſſiſe of mortdanceſtor the ſcoffment of the ſame ancestor is no plea in bar but to the aſſiſe; for the action is taken of later time, viz. of the dying ſeiſed after, abſque hoc that * he enſcoffed &c. Br. Mortdanceſtor, pl. 49. cites 43 Aff. 20. per Thorp.

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13. In mortdanceſtor by the heir of a ſon inasmuch as his mother had entered into religion it is a good plea, that before the entry into religion ſhe took W. N. to baron who is yet in full life; for if he be alive ſhe may be deraigned; contra if he was dead; quod nota. Br. Mortdanceſtor, pl. 50. cites 5 E. 4. 3.

14. If I bring mortdanceſtor it is a good plea that it was found by office that the father of the demandant died ſeiſed of the land and held of the King, the demandant being within age, and that the King granted the ward to him, and a good plea without ſaying that he died ſeiſed in fact; becauſe he claimed by the King, and office ſuffices for the King. Br. Mortdanceſtor, pl. 51. cites 5 E. 4. 3.

(I) Pleadings. Reviver of Action; what is.

As in mortdanceſtor of the ſeiſin of his brother &c. the tenant ſaid

1. IT ſeems that where the ancestor dies ſeiſed and there is a descent by tort after, and the heir enters, and the other recovers by aſſiſe of novel diſſeiſin, this ſhall revive the mortdanceſtor again; quod nota. Br. Mortdanceſtor, pl. 25.

that he himſelf brought aſſiſe of novel diſſeiſin againſt the demandant and others, and recovered by verdict againſt him &c. becauſe he was found diſſeiſor, and the eſtate of his brother merged between the diſſeiſin and the recovery of the demandant, judgment if aſſiſe; to which the demandant ſaid that he was not diſſeiſed in life of his brother, nor any time before his death, Priſt, & non allocatur; for the record ſtands in force againſt him; and after he ſaid that the diſſeiſin was after the death of the brother, and the others e contra. Br. Mortdanceſtor, pl. 25. cites 10 Aff. 16.

2. Mortdanceſtor was brought in Suffex and adjourned into Bank; the tenant demanded judgment of the writ, becauſe the defendant himſelf was ſeiſed after the death of the ancestor; the demandant ſaid that after the tenant had recovered the ſame land by writ of entry ad terminum qui preteriit of the leaſe of his father, ſuppoſing that the father of the tenant leaſed &c. and recovered by default, and ſo the laſt ſeiſin void; and therefore this writ is maintainable by

by all the Justices, and the demandant is not put to his writ of right notwithstanding the recovery was by default. Br. Mortdancestor, pl. 27. cites 11 Aff. 17.

(K) Pleadings over.

1. **I**N mortdancestor the tenant pleaded *nontenure* in abatement of the writ of *parcel of the demand*, and * *if it be found &c.* he is ready to bear the recognizance and was received to this plea. 2 Aff. 10. Br. Mortdancestor, pl. 14. cites S. C. but all the editions are
* Si (ne) foit trove &c.

2. In mortdancestor *nontenure of parcel was pleaded in bar*, and the Court compelled him to plead over to the assise by & *si trove ne foit &c.* and so see that it goes only to the writ; but note that at the common law it was to the writ for all; but now by the statute 25 E. 3. of Treasons, cap. 15. it shall not abate the writ but for parcel. Br. Mortdancestor, pl. 28. cites 12 Aff. 8.

(L) Issue. What good. And where, and when tried. [435]

1. **I**N mortdancestor the tenant vouched one who entered into the warranty, and said that the ancestor did not die seised &c. And notwithstanding this the assise was charged upon all the points of the writ; quod nota; and quære, if this shall be a good issue, that he *did not die seised*; for the writ is, Si fuit seifitus in dominico suo ut de feodo die quo obiit; and therefore it seems that the issue shall be, that he *was not seised ut de feodo and die quo obiit*. Br. Mortdancestor, pl. 20. cites 9 Aff. 3.
2. In mortdancestor if the tenant vouches, and the demandant counterpleads it, and so to issue, the issue shall be tried immediately by the assise, and so it was; quod nota. Br. Mortdancestor, pl. 33. cites 26 Aff. 43.

(L. 2) Tried How. Where there are several Tenants.

1. **I**F the writ of mortdancestor be brought by several summons's against several tenants, in such case the assise may be taken one against one tenant, and another against the other tenant; quod vide. 3 E. 3. Itin. North. F. N. B. 196. (H).

(L. 3) Evidence.

1. **I**F the tenant saith that he is ready to bear the recognizance of the assise, he cannot give in evidence that the demandant is a bastard, but he ought to have pleaded it. 2 Inst. 400.

* See (A).

(M) Verdict. And * what shall be inquired.

* Orig. (a-
dire prise).
† It should
be 10 Aff.
21.

1. **I**N mortdancestor the tenant vouched, which was counter-pleaded by the statute, and the assise was charged upon the counterplea, and over upon the points of the writ, and the counterplea was found for the demandant, and the assise said further, that the ancestor went out of the country, so that they did not know if he was dead or alive, and they were charged to * say precisely upon the points of the writ, and so they did. Br. Mortdancestor, pl. 26. cites † 10 E. 3. 21.

2. In mortdancestor it was not inquired of the time of the death of the ancestor; for this appears to be within the limitation by the nonage of the heir. Br. Mortdancestor, pl. 43. cites 34. Aff. 10.

[436] (N) Judgment. Given where, and how. And of what Damages &c.

1. By Stat. of Gloucester, **I**T is provided, that where before this 6 E. 1. cap. 1. time damages were not awarded in a plea of mortdancestor (but in case where the land was recovered against the chief lord), that from henceforth damages shall be awarded in all cases where one recovers in an assise of mortdancestor.

2. In mortdancestor in Pais, the tenant vouched foreign, and the voucher granted, and the parol^a was adjourned into Bank to try the voucher, and writ issued to summon the vouchee returnable &c. at which day he made default, and immediately the parol was remanded, and so note that the vouchee was not re-summoned, and no re-summons awarded against him, and if the assise passes for the demandant, judgment shall be given before the Justices assigned, and after the tenant shall cause the record to come into Bank to have judgment over in value. Quod nota. Br. Mortdancestor, pl. 15. cites 3 Aff. 10.

3. In mortdancestor the tenant vouched J. who said, that the ancestor of the demandant had an elder son who was attainted of felony, and abjured in life of his father, and vouched record of the attainder, and failed at the day, and the plaintiff prayed judgment, and released his damages, and was not suffered, because he was an infant; and the assise was awarded at large notwithstanding the failure of the record, which found that the ancestor was seized,

ſeiſed, and had an elder ſon who was attainted in the life of his father, and went out of the country, and did not come back, and whether he ſurvived the father or not, or whether the demandant is next heir they know not; and becauſe thoſe things were not denied of the vouchee, by reaſon that he pleaded that the demandant had an elder brother, which implies that the demandant is ſon of the father, and alſo he failed of his record; therefore the demandant recovered the land and damages againſt the vouchee; the reaſon ſeems to be, in as much as the vouchee failed of his record; for otherwiſe it is not found if the eldeſt ſon ſurvived his father or not. Quære &c. Br. Mortdanceſtor, pl. 36. cites 29 Aff. 11.

4. In mortdanceſtor; a man had *iſſue two daughters by diſſerſe venters, and died ſeiſed, and A. abated; the one daughter releaſed within age, and died without iſſue, and the other brought mortdanceſtor, and recovered; for ſhe ſhall recover the whole of the ſeiſin of her father; becauſe ſhe who releaſed was never ſeiſed, and the releaſe is void by reaſon of the infancy; contra if ſhe had made feoffment; note the difference; for then it had been good for one moiety, and the one cannot be heir to the anceſtor by reaſon of the ſeveral venters; and the demandant ſhall recover damages; and therefore it was inquired of the time of the death of the other who releaſed; for the demandant ſhall not recover damages for the time of him who releaſed. Br. Mortdanceſtor, pl. 43. cites 34 Aff. 10.*

[For more of Mortdanceſtor in general, ſee Aſſiſe, and other proper Titles.]

Mortgage.

[437]

(A) What it is.

1. **A** Mortgage is when a *feoffment* is made upon ſuch condition, *that if the feoffor pay to the feoffee at a certain day &c. 40l. that then the feoffor may re-enter &c.* In this caſe the feoffee is called tenant in mortgage; and it ſeems, the reaſon why it is called mortgage is, becauſe it is doubtful whether the feoffor will pay at the day limited or not; and if he does not pay, then the land which is put in pledge is taken from him for ever, and ſo dead to him upon condition &c. And if he does pay the money, then the pledge is dead as to the feoffee &c. Co Litt. S. 332.

It is only a trust till the equity of redemption is released

or foreclosed. Per Ld. Cowper. 2 Vern. 450. Pasch. 1706. Attorney General v. Hesketh.—— Hill. 1702. Ch. Prec. 215. S. C.——It is only *tenancy at will* to the mortgagee, the mortgagee paying the interest. Carth. 101. in Case of Smith v. Pierce.

2. A mortgage is *not merely a trust*, but a title in equity. Per Hale Ch. B. Hard. 467. Trin. 19 Car. 2. in Case of Pawlet v. the Attorney General.

3. A mortgage is looked upon but *as a personal contract*, and the mortgagee has no interest beyond his money. Per Ld. Sommers. Mich. 1699. Ch. Prec. 99.

(B) *What is a Mortgage, and what a Purchase.*

An absolute conveyance is made for 1000l. to B. and instead of entering and receiving the profits, demands in-

terest for the money which is paid him; this will be admitted to explain the nature of the conveyance. Ch. Prec. 526. Mich. 1719. in the Case of Maxwell v. Lady Montague.

1. A Mortgage must be *so a principio*, either by a condition in the deed itself, or by another collateral deed made at the same time; for the condition ought to be made and conceived at the same time with the conveyance, and a subsequent agreement is but a nude agreement. Arg. Per Churchill. The matter was referred. 2 Chan. Cases. Trin. 12 Car. 2. in Case of Copleston v. Boxwill.

2. *Absolute conveyance* of a reversion of leases was made by A. to B.—B. dies; C. the son of B. denies redemption. On reading a bill which was exhibited by B. against A. to have the lands or money, and which makes it appear a mortgage, a redemption was decreed paying principal and damages. 1 Chan. Rep. 222. 13 Car. 2. Bowen v. Edwards.

A mortgage was in Wales by lease and release for 300l. proviso to be redeemed on payment of 300l. on any Michaelmas Day,

but there was no covenant to pay the money. Ld. Cowper thought this in nature of a conditional purchase, and redeemable even at law to the end of the world. Ch. Prec. 423. Mich. 1715. Howell v. Price.

3. A. bargains and sells lands for 1000 years to B. in consideration of 5000l. on condition to be void on re-payment of 5000l. on any 10th day of August during the Term, and 400l. per ann. till paid. This is a mortgage, and the 400l. per ann. is interest money after the rate of 8l. per cent. and *not a rent charge*; and interest being now reduced by statute 12 Car. 2. 13. to 6l. per cent. A. shall account for no more. Tr. 27 Car. 2. Fin. R. 226. Dandy v. Read.

[438] 4. A. surrendered a copyhold to B. and his heirs *without any condition* mentioned in the surrender, but it was in consideration of 100l. lent by B. to A. and for further security whereof A. gave B. a judgment for 200l. And by a note sign'd by A. and B. dated before the surrender it was agreed, that B. on payment of the money should surrender back the copyhold, and acknowledge satisfaction on the judgment. B. was admitted and devised it by his will to several persons, and they afterwards disposed

posed of the same. Decreed a *redemption*. Fin. R. 376. Trin. 30 Car. 2. Clench & Wife v. Witherly & Hobert.

5. A. in 1657, conveys to B. subject to redemption *on payment of 380l. in 1688*, and possession is immediately delivered at the time of conveyance. The estate was but 15l. per ann. but by the decease of two old lives became 45l. and a rent was reserved of 5s. per ann. on the conveyance, which was constantly paid by B. Ld. North decreed a redemption before the day of payment in the proviso, and an account of the profits. Vern. 183. Tr. 1683. Talbot v. Braddil.

Jefferies C. inclined that the plaintiff should redeem, but proposed, that whereas the master had reported B. to be 60l. overpaid, and B.

since that received two years profits, the plaintiff should waive the benefit of the account, and B. forthwith deliver possession, and gave B. a week to consider of it. Vern. 395. Pasch. 1686. Talbot v. Braddil.

6. Where there is a *clause* or provision to *re-purchase* by the vendor, the time limited ought to be precisely observed. And upon an absolute conveyance from A. to B. it was insisted that B. declared, if A. would repay B. his money within one year, and give B. (who was a serjeant at law) 100l. for his pains, that A. should repurchase his estate; but bill dismissed per Ld. North. Vern. 268. Mich. 1684. Barrel v. Sabine.

7. A. conveys land to B. who is put into possession; the *deed was absolute*; but there was an agreement, that if A. pays the money in 10 years, B. shall reconvey. The profits appearing to be much more than the interest, upon a bill by the heir to redeem it was decreed that B. account for the profits, and not be permitted to set the profits against the interest. Vern. 476. Mich. 1687. Fulthorp v. Foster.

In Case of Welch mortgages, the Master of the Rolls thought, that if the value was excessive, the Court

would decree an account notwithstanding the agreement to retain the profits in lieu of the interest. Vern. 477. in Case of Fulthorp v. Foster.

8. A. borrows 200l. of B. and surrenders a copyhold of inheritance to be void on payment of the 200l. and interest in April following. A. gives bond to B. at the same time, that if the 200l. and interest should not be paid at the day, that if B. should pay to A. &c. 78l. more within 10 days after in full for the purchase of the premises, the bond should be void. A. died before the mortgage was forfeited; the 200l. was not paid at the day; B. pays the 78l. the day after to A's administrator. This was no absolute purchase; and ordered the whole 278l. to be repaid, and costs, discounting the mesne profits. Vern. 488. Mich. 1687. Willet v. Winnell.

9. A. for 550l. makes an absolute assignment of a lease to B. and B. by writing under his hand agrees that if A. pays B. at the end of the year 600l. B. will reconvey. B. dies, leaving C. his son and heir; two of the lives die, and the lease is twice renewed, and now it was 20 years after the first conveyance. Yet Master of the Rolls decreed a redemption on payment of the 550l. and the two fines paid for the renewal with interest, and during B's life the profits to be set against the interest, but C. to ac-

count

count for the profits since. 2 Vern. 84. Mich. 1688. *Manlove v. Ball & Bruton*.

[439] 10. A. for 80*l.* conveys *absolutely* to B.—A brings a bill to redeem.—B. insists that the grant was absolute, but *confessed it was a trust*, that after the principal and interest paid, B. should stand seised *for A's wife and children*. Plaintiff replies to the answer, but no proof of the trust, and therefore it was insisted that the husband should redeem; but decreed a trust for the wife and children. 2 Vern. 288. Pasch. 1693. *Hampton v. Spencer*.

11. If a mortgagee afterwards gets an *absolute deed*, but suffers possession to go some time contrary to it, it will again make it but a mortgage. G. Equ. R. 11. Mich. 7 Annæ, in Case of *Harris v. Horwell*.

12. A. a jointenant with her sister made an absolute conveyance to B. in fee for 104*l.* which was intended only as a mortgage. After in 1708, those deeds were cancelled; and then A. in consideration of 184*l.* (including the 104*l.*) paid by B. convey'd the premises as before; but with a farther covenant, *not to agree to any partition without B's consent*. The sister was in possession till 1710, at which time B. ejected her out of the moiety, and enjoy'd it quietly till 1726, when A. brought her bill for redemption, to which B. pleaded himself an absolute purchaser. The receipts given for the money mentioned it to be purchase money. In 1710, there was an agreement that A. might have the estate again, if desired, paying principal, interest, and charges. The cause was first heard before the Master of the Rolls, who dismissed the bill; and afterwards coming on before the Ld. Chancellor, who took notice that the case was very dark, but that the said agreement shewed it was not redeemable at first; and that upon considering what, upon proof, he took to be the annual value of the estate, and the other matters, he was inclin'd upon the whole to think it an absolute conveyance at first. Had A. continued in possession any time after executing the deeds, he should have been clear that it was a mortgage; and the *long acquiescence* [of 16 years] under B's possession was a *strong evidence of its being an absolute conveyance*; for otherwise the length of time would not have signified; because they who take a conveyance of an estate as a mortgage, without any defeasance are guilty of fraud, and no length of time will bar a fraud, and disapproved the practice in the North of making mortgages absolute, and the defeasances by a separate deed, as carrying a face of fraud. Sel. Ch. Cases, in Ld. Talbot's time. 61. Hill. 8 Geo. 2. *Cotterel v. Purchase*.

13. A. being indebted to J. S. and threatened to be sued by him proposed to assign a term which he was in possession of, which J. S. agreed to, but whether *absolutely in discharge of the debt*, or by way of security only was not mentioned; however, J. S. got an absolute assignment drawn, which occasioning disputes, B. the brother of A. interpos'd, and it was at length agreed, that B. should give his bond to J. S. for the debt, and that the name of J. S. should be struck

out of the assignment, and B's inserted without any other alteration in the deed, and the same to be executed by A. but that there should be an indorsement purporting that the deed was to indemnify B. against the said bond; all which was done. Two days afterwards A. by a writing directed the tenants to attorn to B. which they did, and then (as B. swore in his answer) A. and B. agreed that the assignment should be absolute and without redemption. A. became afterwards bankrupt, and a bill was brought against B. for a redemption. Parker J. who sat for the Chancellor, said, it could not be doubted, but this at the time of execution was intended only as a mortgage; for tho' it had the appearance of an absolute deed under hand and seal, yet the indorsement, tho' under the party's hand only, was sufficient to shew that in equity at least it was only a mortgage. And that what was done two days after the executing the deed did not alter the nature of it, nor amounted to a release of the equity of redemption, but only to a direction to the tenants to attorn to the mortgagee; and decreed a redemption accordingly. Barn. Chan. Rep. 30. Pasch. 1740. Franklyn v. Hern.

(C) Disputes between Mortgagor and Mortgagee. [440]

1. **T**HE money upon the mortgage being paid the mortgagor sued to have the deed again, and not admitted, because then he may charge the mortgagee for profit past. Toth. 229, 239. cites 4 Eliz. and 38 & 39 Eliz. Langford v. Comit. Salop.

2. If mortgagee commits waste, the mortgagor has no remedy, unless there is a covenant not to commit waste. Cro. J. 172. Trin. 5 Jac. B. R. in Case of Evans v. Thomas. The mortgagee in fee after a forfeiture may cut down

timber at law, as the legal estate is in him; but not in this Court, unless it be a *scanty security*, in which case Chancery will not restrain it, as it will if it be an *ample security*; for as the mortgagee is only a trustee for the mortgagor, the timber when cut down must be apply'd to ease the estate, and not for his own benefit. Arg. And Baron Price who sat in the Ld. Chancellor's absence said, that mortgagee in fee may at law commit waste, but never in equity, unless it appears a defective security. Select Cases in Chan. in Ld. King's time. 31. Trin. 11 Geo. 1. in Case of Witherington v. Banks & Costefworth.

3. The mortgagee was decreed to account for the profits received, and for the use of those profits. Toth. 230. cites 13 Jac. Holman v. Vaux. But he shall not account for more than he actually made

of the land, or might have made had it not been for his wilful default. As if he *turned out a sufficient tenant* that held it at so much rent, or *refused to accept* a sufficient tenant that would have given so much for it. Vern. 45. Pasch. 1682. Anon.—Chan. Cases 258. Hill. 26 & 27 Car. 2. Chamberlain v. Chamberlain.

The profits were set against interest in an old mortgage. MS. Tab. cites 25 June 1715. Bail (als. Basil) v. Acheson.

If the mortgagor makes proof that the estate was let at such a price while in the hands of the mortgagee, that shall be deem'd the rate at which he let for the whole time, unless he shews the contrary, which is in his power as being let by him. Sel. Ch. Cases in Ld. King's time 53. November 17, 1725. Blacklock v. Harris.

4. Lease by way of mortgage; if the money be paid tho' after the

the day, 'tis void in equity against a purchaser, or a charity.
 Chan. Rep. 18. 1 Car. 1. Emanuel College v. Evans.

Mortgagee
 before fore-
 closure can-
 not make a
 lease for

5. *Leases made by mortgagee at rack and improved rents are to be allowed, and stand good; otherwise not.* Chan. Rep. 172. 1656. Welden v. Rallison.

years of a house &c. in mortgage to bind the mortgagor, *unless* to avoid an apparent loss and merely in necessity; per Lord Chancellor, Pasch. 1722. and so reversed a decree at the Rolls. 9 Mod. 2. Pasch. 8 Geo. Hungerford v. Clay.

6. Mortgagee *demises to mortgagor* the land for years; this demise does not *suspend the condition*; for the payment of the mortgage money does not arise from the profits of the land; and this condition is *collateral*. Jenk. 254. pl. 46.

7. If lands be mortgaged to one, the *interest in law* in these lands is in the mortgagee before the forfeiture of them; for he hath purchased the lands upon a valuable consideration as the law will intend; and tho' the mortgagor may *redeem* in the respect of the agreement betwixt the parties, yet it is not known whether he will do it or no; and if he do it not, then the *estate in law* is *absolute* in the mortgagee, without any other act to be done to pass the estate; but the mortgagor hath an *equitable right of redemption*. 2 L. P. R. 203. cites Mich. 23 Car. B. R.

8. Where a mortgage is forfeited, the mortgagee may bring an *ejectment* without an actual entry; for he is in possession upon the executing of the conveyances. 2 L. P. R. 203.

9. Mortgagee refusing to receive his money upon tender after forfeiture, shall lose his interest from the tender. Chan. Cases 29. Mich. 15 Car. 2. Manning v. Burges.—Another like case cited there between Peckham v. Legay.

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10. Mortgagee renews a church lease, the mortgagor shall be relieved. 2 Chan. Rep. 59. 20 Car. 2. Darrell v. Whitchcott.

11. An agreement that the mortgagor should pay off so much money for lessening the debt, and that *part of the lands* in mortgage should be *left out of the mortgage* was decreed. Fin. R. 138. Mich. 26 Car. 2. *Ld. Vaghan v. Morgan & Moneux*.

The renew-
 ed lease de-
 creed to the
 mortgagee.
 Fin. R. 392.
 S. C. Trin.
 30 Car. 2.

12. After a statute acknowledged and a mortgage of a term the *term expires*; the conusor's trustees *renew* the leases in their own names; yet decreed the whole estate of the mortgagor (he having other estates) liable to the statute. 2 Chan. Rep. 113. 28 Car. 2. *Lucking v. Rushworth*.

13. If a mortgage be for 100*l.* with a proviso to be void on payment of 100*l.* at the end of a year and *no covenant for the mortgagor to take the profits* till default be made in payment, so that in strickness the mortgagee is intitled to the interest and profits, yet the not expressing it does not make the agreement usurious. 2 Mod. 307. Pasch. 30 Car. 2. *C. B. Ballard v. Oddley*.

14. Where an heir or trustee buys in an incumbrance, he shall be allowed only so much as he paid, unless he bought it in to *prot et an incumbrance* to which himself is intitled; but if a stranger or mortgagee buys in an incumbrance, he shall be allowed

lowed all the money and arrears of interest due, tho' purchased for less. Vern. 49. Pasch. 1682. Darcy v. Hall.

15. Mortgagor is only tenant at will to the mortgagee paying the interest, and tho' he makes *under leases*, or a *settlement on marriage of his son*, and thereupon levies a *fine*, and *five years pass* without any claim, yet if he continues to pay the interest, this fine shall not affect the mortgagee. Carth. 101. Mich. 1 W. & M. B. R. in Case of Smith v. Pierce.

Mortgagee is but a trustee for mortgagor till the equity of redemption is released or foreclosed;

per Lord Cowper. 2 Vern. 450. Pasch. 1706. Attorney General v. Hesketh and al.—Ch. Prec. 215. S. C. Hill. 1702.

16. *Mortgagee entails* the lands by fine; mortgagor sues for redemption, which is decreed and the money paid and no mention of the entail in all the proceedings; the *issue of mortgagee brings ejectment* and recovers; but mortgagor was *relieved* having paid his money pursuant to the decree, and having been in no fault; and Lds. Commissioners decreed the issue to convey, and, plaintiff to enjoy in the mean time, and a perpetual injunction against the judgment. 2 Vern. 142. Trin. 1690. Chapman v. Duncomb.

17. A mortgagor covenants after *default to make further assurance* for the absolute sure-making &c. Per Holt Ch. J. The further assurance must be absolute, because the estate is to be absolute; but this shall not oblige him to release his equity of redemption; and he said a warranty is not to be inserted in such further assurance. Cumb. 318. Hill. 6 W. 3. B. R. Atkin v. Urton.

18. Tho' there be *no covenant to pay the money*, yet if the mortgagor had the money, because it was his debt, he is bound to make it good, tho' the land be a *defective security*. 2 Salk. 449, 450. Cope v. Cope in Chancery.

S. P. by Ld. C. King. 2 Wms's Rep. 455. Pasch. 1728. in

Case of Balsh v. Hybam.—A defective security is a good agreement in equity to *charge the land*. 2 Vern. 151. per Commissioners 1690. Dale v. Smithwich.—In such case if afterwards the *mortgagee proves insufficient* to answer the money lent, yet is not the money lost; for as the residue the mortgagee is a creditor by simple contract; per Harcourt Ch. G. Equ. R. 110 1 Geo. 1. Thomas v. Terry.—Where there was no covenant to pay the money either express or implied in a mortgage in fee, but only a covenant for quiet enjoyment, and that the estate was free from incumbrances, and the mortgagee was in possession, and it was made *redeemable on payment of 300l. at any Michaelmas-day*, Lord Cowper held that no action lay for the money by mortgagee, and that it was redeemable for ever. Ch. Prec. 423. Mich. 1715. Howel v. Price.

19. Bill was brought to *redeem*, and account decreed and 240l. was reported to be due; exceptions were taken to the report, and *pending the exceptions mortgagee burns the wainscott and commits waste*; Ld. Wright on a motion and affidavits ordered possession to the plaintiff, who was a pauper, he giving security to abide the event of the account. 2 Vern. 392. Mich. 1700. Hanson v. Darby.

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20. *Bail* shall be put in on an *action of debt* brought by mortgagor against mortgagee for the mortgage money; per Holt. Farr. 139. Hill. 1 Ann. B. R. Gidden v. Drury.

21. *Heir of mortgagor pretends an entail* and endeavours to overthrow

overthrow the mortgage, by which mortgagee was at a great expence but prevail'd at law.—After the heir *sues to redeem*. Per Cur. the mortgagee shall not be held down to the taxation of his costs at law but on the account, but *shall be allowed all be laid out or expended*, and where, fearing his mortgage would have been defeated at law he *took administration as principal creditor*, he shall be allowed the costs of that too. 2 Vern. 536. Hill. 1705. Ramsden v. Langley.

2 Vern. 564.
11 November
1706.
S. C.

22. Tho' a surrender of a *copyhold* be void in law for want of a *presentment*, and that might be the laches of the mortgagee in not procuring it, yet the surrender was a lien and bound the land in equity; and the surrenderor, or if he become bankrupt, the assignee who ought not to be in better case than the bankrupt, is plainly bound in equity by this defective conveyance. (Et come moy semble says the reporter, he became a *trustee for the purchaser*.) Mich. 8 Ann. 2 Salk. 449. Taylor v. Wheeler.

23. That a mortgagee cannot *present* on an avoidance of a *church* was admitted, because it doth not lessen his debt. 9 Mod. 2. Pasch. 8 Geo. in Case of Hungerford v. Clay.

24. A. the mortgagee brought a *bill to foreclose*, and B. the mortgagor brought a *cross bill to redeem*, and it was decreed to pay principal, interest and costs, or else to be foreclosed and on payment to be let in. B. died; and the account being taken, the plaintiff finding the estate insufficient brings a new bill of *reviver* and partly a *supplemental bill*, both to review the former decree and proceedings, and likewise to have an account of the assets of B. and thereout to have satisfaction for a bond which was given as a collateral security with the mortgage. To this bill the executor of B. pleads the former decree in bar that the plaintiff elected his satisfaction, and had not so much as suggested that that satisfaction was deficient, so that it does not appear but that he may receive a double satisfaction for his debt, and that it was plain that he had not waiv'd the mortgage by his bill of reviver. A. insisted that it was the practice of the Court that taking out of process or making use of any counter-security was in itself a *waiver of the foreclosure*, and that a mortgagee had always his election to waive and open the foreclosure and have recourse to his bond or covenant if he thought proper. But per Cur. the plaintiff by his reviver has not waiv'd the mortgage, or so much as suggested a deficiency; so that the plea must stand for an answer without liberty to except. G. Equ. R. 186. Hill. 12 Geo. 1. Birch's Case.

(D) Disputes between Mortgagor, Mortgagee and Mortgagee.

1. A N agreement between mortgagor and second mortgagee and the assignee of a first mortgagee, decreed to be performed by the mortgagor and the assignee of first mortgagee. See Fin. R. 138. Mich. 26 Car. 2. *Ld. Vaughan v. Morgan, Monoux and Finch.*

2. First

2. *First mortgagee forecloses an after mortgage, and by will devises the lands to mortgagor.* Upon this the after-mortgagee brings a bill to set aside the first mortgage, and to be let into a satisfaction of his money. * The defendant pleads the former suit and decree of foreclosure, but was ordered to answer, 2 Vern. 235. Trin. 1691. *Cook v. Sadler.*—The Court compared it to the Case of *BOVEY AND SMITH*, that the trust should revive. Ibid.

(E) Disputes between Mortgagor and Assignee of Mortgagee.

1. **A** *N old mortgage assigned to another ought to be taken as a new mortgage from the time of the assignment.* 2 L. P. R. 206. cites Chan. Rep. 218.—[But quære if this point be there.]

2. Assignee of a mortgage that comes in at an old hand shall not account but so far only as goes in discount of his money, and not for the surplufage. Ch. Cases 102. Pasch. 20 Car. 2. *Pearson v. Pulley.*

3. On assignment of a mortgage by A. to B. the debt was stated between A. and B. and some of the coheirs that were look'd on to have a right to the redemption. This account shall not conclude a coheir that was not party to the account; per Ld. North. Vern. 169. Pasch. 1683. *E. Macclesfield v. Fitton.*

4. A. mortgaged to B. for 450*l.* principal money payable at 5 years end and interest half yearly in the mean time. About 2 months before the 5 years were expired, no interest being paid, mortgagee assigned to D. in consideration of 560*l.* being so much due for principal and interest. Lds. Commissioners decreed the 560*l.* to be paid with interest from the time of the assignment; for the mortgage was forfeited long before by non-payment of interest. Hill. 1690. 2 Vern. 135. *Gladman v. Henchman.*

S. P. doubted. Pasch. 1683. Vern. 169. E. of Macclesfield v. Fitton.—All money really due and paid by the assignee to the mortgagee shall

be taken as principal against the mortgagor from the time of the assignment. 2 L. P. R. 204. cites Chan. * Rep. 68, 258.—[* It should be Chan. Cases.]

5. The original covenant for the mortgagor to enjoy 'till default of payment governs all the subsequent assignments; for he covenants for himself, his executors, administrators and assigns, that the mortgagor shall hold till default of payment, which creates a tenancy at will upon all the mesne assignments; per Eyre J. to which Holt Ch. J. agreed and said it was well observed. Cumb. 249. Pasch. 6 W. & M. B. R. *Smartle v. Williams.*

Skin. 424. Per Eyre J. And. Newport's Case.

(E. 2) Disputes between Mortgagor and Assignee of Mortgagee, the *Mortgagor not joining*.

1. **A** Mortgage being forfeited mortgagee assigns his interest to another on payment of the money, tho' it was insisted for the mortgagor that this was a breach of trust in the mortgagee. The Court was of opinion that mortgagee should *account for all the profits* both before and after his assignment and pay himself in the first place, and the surplus to the mortgagor, and that he should convey and procure all persons claiming under him to convey the lease to the mortgagor free from incumbrances done or committed by him or them.—Afterwards the *assignee* (who was son of the mortgagor) claiming the original lease by a *title paramount to the mortgagor*, and it appearing that he had such a title the mortgagee was discharged against him. 13 Car. 2. N. Ch. R. 60. Venables v. Foyle.

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Per Finch
K. Contra.
Hill. 26 &
27 Car. 2.
Chan.
Cafes. 258.
Chamber-
lain v.
Chamber-
lain.—* N.
Ch. R. 150.
S. C.—154.
S. P.—
† Ch. Cafes
67. S. C.

2. Assignee of a mortgagee shall not be in a *better condition* than the mortgagee, and so would not allow the interest paid to the mortgagee by the assignee to be taken as principal and to carry interest; per Ld. Chan. Shaftsbury upon appeal against a decree of Ld. Keeper Bridgman's. Hill. 1672. 3 Ch. R. 78. * Porter v. Hobart.—But if the *mortgagor came into the assignment* it is otherwise, ut ante 79.—Cafes cited to support Bridgman's degree were WARDER v. SAYER, Mich. 13 Car. 2. per Master of the Rolls. HAMOND v. CONNINGSBY, Mich. 18 Car. 2. Ld. Chanc. and Master of the Rolls. † SMITH v. PEMBERTON, Pasch. 17 Car. 2. Ld. Chanc. Chan. Cafes 67.

3. A. the mortgagee covenants that mortgagor shall quietly enjoy till default of payment. A. assigns his mortgaged term to B. *without the mortgagor's joining in the assignment*; after assignment mortgagor, who before was *tenant at will*, is now only *tenant at sufferance*, but his continuing in possession does not turn the term to a right. 1 Salk. 245. Pasch. 6 W. & M. B. R. Smartle v. Williams.

* Skin. 423.
Andrew
Newport's
Case.

4. Upon executing the deed of mortgage, the mortgagor by the * *covenant to enjoy* till default of payment, is *tenant at will*; and the assignment of the mortgagee to the assignee, and the assignee's assigning it over again *without the mortgagor's joining*, can only make the mortgagor *tenant at sufferance*; but his continuing in possession can never make a *disseisin*, nor divesting of the term mortgaged. Otherwise, if the *mortgagor had died and his heir had entered*; for the heir was never tenant at will, but his first entry was tortious; or if the *mortgagee had entred on the mortgagor, and the mortgagor had re-entred*; for the mortgagee's entry had been a determination of the will, and the re-entry of the mortgagor had been merely tortious. Per Holt Ch. J. 1 Salk. 246. Pasch. 6 W. & M. B. R. Smartle v. Williams.

5. The

5. The bringing an *ejectment* by assignee of mortgagee (in which assignment the mortgagor did not join, nor was the mortgagee in actual possession) cannot admit an actual *devesting*, so as to turn the term to a right; for that was not brought to *recover* the mortgage term, but the *actual possession only*, and the Court will take notice that an ejectment is only a fictitious proceeding. Per Holt Ch. J. 1 Salk. 246. Pasch. 6 W. & M. B. R. Smartle v. Williams.

3 Lev. 388. S. C. and P.—Skin. 423. S. P. Andrew Newport's Case.

6. The first assignment of the mortgagee may be good by determination of his will, but *subsequent assignments* made when *out of possession* are void, unless *sealed upon the land*. Per Levins. Arg. who said he had been nonsuited on that point; but Holt Ch. J. said obiter he had had hard luck then. Cumb. 249. Pasch. 6 W. & M. B. R. Smartle v. Williams.

1 Salk. 245. S. C.—3 Lev. 387. S. C. and Holt Ch. J. and Eyre J. held all the assignments good though

the mortgagee was out of possession, and the mortgagor did not join in any of the assignments.—1 Salk. 245. S. C. and P.—Skin. 423. Pasch. 6 W. & M. B. R. Andrew Newport's Case.

(F) Disputes between Mortgagee and Mortgagee.

1. C. Brought a bill against B. to be let into A's estate after prior incumbrances to B. satisfied. B. pleaded that there were *prior incumbrances* to him of all the lands which C. claimed, and that he had a *puisne* incumbrance to C. of *part of a statute for collateral security*. The question was, if B. should hold all, both to satisfy the prior incumbrance, and what was his own security, or only to satisfy his own money? And he having a statute *extended*, it was by Bridgman K. and Judges Assistants adjudged for B. the defendant on demurrer. 3 Ch. R. 62. Mich. 1670. March v. Lee.

See Fraud (Q)—Incumbrances (C). See ibid. 67. Bovey v. Shipwith. Pasch. 1678.

2. A. seised of two manors called W. and M. mortgaged part of W. to B. for 1000l. and afterwards acknowledged a statute to B. of 800l. for payment of 400l. Afterwards A. mortgaged both manors, W. and M. to C. for 7000l. and after mortgages W. for 2000l. to D. who had no notice of the former mortgages. But after notice of the mortgage to C. D. purchased in the mortgage and statute to B. The Ld. Keeper, assisted with Hale Ch. B. and Rainsford J. held, that D. might make use of those incumbrances to defend his own mortgage; for they said, that he had *both law and equity*. And they held that part only of W. being mortgaged to B. but the whole manor of W. being now mortgaged to D. that yet the *first mortgage should protect only that part of W. first mortgaged to B.* 2 Vent. 337. Trin. 22 Car. 2. Marsh v. Lee.

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3. If a man mortgages lands by a defective conveyance, and afterwards mortgages to a second person by an assurance that is good and effectual without notice, the second shall prevail; because that carries the legal title, and equity will not interpose when both are equally upon a valuable consideration. Abr. Equ. Cases 320. (E) pl. 1. cites Mich. 1670. Burgh v. Francis.

4. An

4. An *after-mortgagee* of a ship who had got possession of her, tho' he was decreed to be postponed to the first mortgagee as to his debt, yet as to *money laid out in preserving the ship* by calking, pitching, oker &c. it was ordered to be paid in the first place out of the monies arising out of the sale of the ship. Pasch. 27 Car. 2. Fin. R. 206. Degelder v. Depeister.

Land is mortgaged to A. then to B. then to C. If A. sued to redeem and try his debt by decree,

5. An *account settled* before a master by direction, between mortgagor and mortgagee, shall bind a second mortgagee if there be no *fraud* or collusion, and if he deny the fraud and collusion it is enough; and in charging fraud to open the account the second mortgagee must charge particulars. Per Finch C. Chan. Cases 299. Trin. 29 Car. 2. Needler v. Dibble.

C. A. and B. shall be bound by the *account* which A. made in his suit, and pay or contribute to the charges of suit, if made without fraud or collusion. 2 Chan. Cases 32. Trin. 32 Car. 2. Anon.

6. A. mortgages land to B. and after mortgages the same to C.—B. *having possession by attornment of the tenants*, shall be charged with the profits (by whomsoever they were received after the second mortgage made, but not before) upon redemption by the second mortgagee. 2 Chan. Rep. 209. 32 Car. 2. Maddocks v. Wren.

N. Ch. R. 91. 15 Car. 2. S. P. in Case of Churchill v. Grove.—And held that this notice must

7. A. took a *statute for 200l.* lent, but finding a former incumbrance for other 200l. purchased in that, and also another mortgage for 500l. to C. The plaintiff had a mortgage which was precedent to all but the 200l. purchased in. The plaintiff cannot be let in without payment of all, unless he, that purchased in, had notice. Trin. 32 Car. 2. 2 Chan. Cases 35. Anon.

be express, though it be a judgment on record, and though at law it charges the land. Ibid.

8. A mortgagee has *notice of subsequent incumbrances*, and there is *one of which he has no notice*. He purchased an *absolute conveyance* for a considerable sum of money. He shall be liable to those debts of which he had notice, but no relief for the other. 2 Chan. Cases 170. Hill. 1 Jac. 2. Grefwold v. Marham.

9. Mortgagor for further consideration *released the equity of redemption* to B. the mortgagee absolutely, and afterwards mortgaged to C. for 1000l. *Second mortgagee shall protect himself by an old statute*. Per Rawlinson Commissioner. 2 Vern. 160. Trin. 1690, in Case of Hitchcox v. Sedgewick.

[446] 10. *Bill by second mortgagee to foreclose first mortgagee*, who had been at great expence in *foreclosing the mortgagor*; per Cur. his costs shall not be taxed as in an adversary suit, but *shall be all allowed* as in the case of a solicitor who lays out money for his client, and the profits of the estate shall first pay off those costs and disbursements, before it is apply'd to sink the principal. 2 Vern. 185. Mich. 1690. Lomax v. Hide.

11. *Fine and non-claim* by mortgagor to a second mortgagee in fee, and the mortgagor being all the time in possession, and paying the interest, the mortgagor is tenant at will to the first mortgagee, and his mortgage for 500 years is not *barred* by the fine and non-claim. Carth. 414. Trin. 9 W. 3. B. R. Holland v. Hatton.

12. A

12. A. mortgaged first to B. and then to C. Afterwards B. lent to A. more money on a statute. C. brought a bill and charged notice, but B. denied notice evasively only; and because he did not deny it positively, Ld. Wright and Master of the Rolls decreed a redemption on payment of the first money only. Trin. 1703. Ch. Prec. 226. *Cason v. Round.*

If a first mortgagee lends a further sum to the mortgagor upon a statute or judgment, he shall re-

tain against a mesne mortgagee, till both mortgages and statute or judgment are satisfied; because it is to be presumed, that he lent his money on the statute or judgment, as knowing that he had hold of the land by the mortgage, and in confidence ventured a further sum on a security, which tho' it gave no present interest in the land, yet must be admitted to be a lien thereon. Per the Master of the Rolls. Mich. 1728. 2 Wms's Rep. 494. *Brace v. the Dutchess of Marlborough.*

13. Land was mortgaged first to A. and then to B. Afterwards the land was settled subject to these mortgages on J. S. for life, remainder to J. N. an infant; A. brings bill to foreclose B. and J. S. Per Cur. B. the second mortgagee may be foreclosed, and tho' A. cannot have the like remedy against the infant in remainder, who cannot be foreclosed, because he is an infant, yet B. the defendant must be foreclosed unless he redeems within 6 months; and tho' there were other incumbrancers not made parties, yet A. may foreclose such defendants as he had brought before the Court; and tho' it was objected that the infant in remainder had a right to redeem all, and therefore to have the first election and to be first foreclosed, yet it was not allowed. 2 Vern. 518. Mich. 1705. *Draper v. Jennings.*

14. A. mortgaged the same land, first to B. afterwards to C. and after that to D. The mortgage to C. is only between A. and C. but takes notice of the mortgage to B. and that after that is satisfy'd, it shall stand charged to C.—A. and B. both join in the deed to D. which provided that after B. was paid the estate should next answer D's debt; all these securities were made by the same scriveners, who engrossed and witnessed the deeds and were as agents to the several lenders; decreed at the Rolls, and now affirmed by Ld. Cowper, that C. shall be paid before D. For it is plain the scriveners had notice, and notice to the agent is notice to the party; and where there are several mortgages, if they that lend last have notice of prior mortgage they must be paid last. 2 Vern. 574. Hill. 1706. *Brotherton v. Hatt, Coy, Sir Edward Hungerford & al.*

15. After a decree to foreclose the mortgagor by the first mortgagee a second mortgagee may redeem the first, tho' the first mortgagee had no notice of the second mortgage before the decree; per Ld. Cowper. 2 Vern. 601. Mich. 1707. *Godfrey v. Chadwell.*

Fin. R. 409. *Shermer v. Robins, Cog & al.* S. P. —After a purchase made under

such decree. Ibid. Hill. 31 Car. 2.—But the sum computed due on the decree for principal and interest shall be taken as a stated account and be reckoned principal from the time of the decree. Ibid. —3 Chan. R. 83. S. C.—N. Ch. R. 71. S. C.

16. If first mortgagee takes a release of the ultimate equity of redemption yet he is not thereby obliged to pay the intermediate mortgages, provided he will still waive such release; per Cowper C. Wms's Rep. 393. 395. Hill. 1717. *Mocatt v. Murgatroyd.*

17. An

17. An after mortgagee prays to *redeem the first mortgagee* paying what was due, and *pending the suit the first mortgagee sets up another mortgage to himself prior to them all*, but it had some untoward marks; decreed a * *trial at law*, whether the mortgage was executed, and if it was, how much money was paid for it. 9 Mod. 38. Trin. 9 Geo. Douse v. Rue.

18. If a *puisne mortgagee without notice buys in a prior judgment or statute*, and that judgment &c. be *extended upon an elegit much under the real value*, the *mesne mortgagee* shall not make the *puisne mortgagee account* otherwise than for the extended value; nor will the Court relieve against the judgment or statute, but leave the *mesne mortgagee* to get rid of them as well as he can at law; per the Master of the Rolls. 2 Wms's Rep. 494. Mich. 1728. Brace v. the Dutchess of Marleborough.

* If a man mortgages all his estate to one person, he may notwithstanding split it into 10 puisne mortgages more; now if all these subsequent mortgagees should have a right to redeem on payment of proportionable contributions,

it would be impossible for the first mortgagee to come at his right till all those proportions are settled, which may, and generally does take a great deal of time, and often produces trials at law; and after all there must be so many different redemptions, and times given for them (either half-years, or quarters) before he can come at his money, or a foreclosure; which appears at first sight to be very inconvenient, and would much invalidate the credit of this kind of security; per Lord Chancellor. Ibid.

* The chief objection in this case was, that by this order, White Acre which was not comprized in C's mortgage, is notwithstanding charged with his debt; but the Lord Chancellor said it was no new thing

19. A. mortgages two estates, viz. *Black Acre and White Acre to B.* and afterwards mortgages *Black Acre to C.* and after that *White Acre to D.* The question was, whether the Court can decree a *redemption of B.'s mortgage* (who was the original mortgagee) by *proportionable contributions of C. and D.* the two puisne mortgagees? And the Lord Chancellor after consideration was of opinion, that the Court could not decree such a redemption; that the *original mortgagee* ought not to be entangled with any * questions that may arise among subsequent mortgagees; that he *has a right to be redeemed intire*, and not by parcels; that his right undoubtedly stood so with regard to the mortgagor, and consequently with regard to the subsequent mortgagees, for the mortgagor could not hurt him by playing his right into another's hands, nor is there any precedent where such a redemption was ever allowed. 12 December, 1739. Titley v. Davis.

20. So if those two estates, *Black Acre and White Acre* are mortgaged to B. and then *Black Acre* is mortgaged to C. and after that *White Acre to D.* and C. *redeems B.'s whole mortgage, he shall hold * both estates* (tho' *Black Acre* only was comprized in his own mortgage), *till he is repaid all that he has disbursed in discharge of B.'s mortgage, and likewise all that is due upon his own mortgage*; and D. shall not be admitted to redeem him but upon those terms; for C. could not have redeemed B. but by an intire redemption of all that was in mortgage to B. and having so done, he stands in B.'s place, and has the same right as he had (viz.) to be redeemed intire, both as against the mortgagor and against D. a subsequent mortgagee; per Lord Hardwicke, who accordingly was for affirming an order of the 22 February 1736, made agreeable to this opinion by the Master of the Rolls; but made no decree, the proper parties not being before the Court.

12. De-

12 December 1739. *Titley v. Davis*.—The cause was afterwards revived, and (ut audiui) a decree made according to this opinion.

for a man, by a subsequent accident, (as by payment of money) to gain lands as a security for his debt, more than he contracted for, and which otherwise would not be liable to it; and mentioned the Cases of *BOVER V. SMITH*. 1 Chan. Cases 201. and *ACTION V. PEIRCE*. 2 Vern. 480. Ibid.

21. *A.* by feoffment mortgaged to *B.* who assigned to *D.* in trust for *C.* Afterwards *C.* mortgaged the premises to *E.* for 500 years, and then *C.* devised them to *F.* in fee. After *C.*'s death *F.* entered and mortgaged to *R.* for 1000 years, and afterwards to *S.* after which the heirs at law of *A.* conveyed the premises to *H.* and his heirs; then *F.* died leaving *G.* his heir at law; *H.* got an assignment from *R.* And *S.* assigned his mortgage to *T.*—Afterwards *C.* assigned all his interest in the mortgage made to *D.* to *T.*—*T.* brought a bill against *G.* and *R.* and *H.* praying an account, and that he might redeem them; Lord Chancellor said, if the plaintiff had got the legal estate either in himself or a trustee for him, so that he could have brought an ejectment, and put the defendants to have been plaintiffs here it might indeed have deserved consideration, whether these defendants would have been intitled to have redeemed the plaintiff; but as the plaintiff has not the legal estate and is forced to come into equity he must submit to be redeemed by *G.* one of the defendants; *qui prior est tempore, potior est jure*, is a rule which holds as well in equitable as in legal rights. In this case *H.* had the first equitable right, and therefore his mortgage must be paid off in preference to that of *T.* the plaintiff; for *T.* has no legal estate for want of taking an assignment from *G.* or at least for not having him before the Court in order to have a conveyance, and therefore *H.* who had an assignment of the mortgage made to *R.* previous to any assignment taken by *T.* must be preferred before him, and it was never determined that a puisne mortgagee could protect himself against a prior mortgagee by purchasing in a mortgage previous to that, where there is no legal estate in that mortgagee from whom he takes his second assignment, especially without bringing the trustee of that mortgagee before the Court; and decreed accordingly. Barn. Chan. Rep. 457: to 463. Pasch. 1741. *Clarke v. Abbot*.

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(G) Disputes between Mortgagee and Assignee of Mortgagor.

1. **T**HE plaintiff alleges by the bill that *M. W.* and *K. W.* by good and sufficient conveyance and assurance in the law, had granted to him and his heirs the third part of the premises in question, and prays relief against the defendant who was in possession by mortgage from the ancestor. De-

defendant *demurred* because the plaintiff set not forth what *kind of conveyance*, or assurance was made to him, so as the Court might judge if the plaintiff had any title, and therefore demanded judgment, and whether he should be called to account for any profits, it appearing that the *plaintiff was never in possession*, but over-ruled. 3 Ch. R. 28. Pasch. 21 Car. 2. *Bluck v. Gore*.

2. Bill was brought by mortgagor to redeem and to have a reconveyance on payment of what was due. *A reconveyance was decreed*. J. S. advanced the money which was paid accordingly to the mortgagee, and the *mortgagor assigned the equity of redemption* to J. S. and the mortgagee had notice thereof; afterwards the bill was dismissed by consent of mortgagor and mortgagee, and then the *mortgagor* for a valuable consideration *released his interest to the first mortgagee*, which release and the dismission signed and inrolled was pleaded to a bill brought afterwards by J. S. to set aside the release, and the *plea* was allowed, but left the plaintiff to reply and take issue if he thought fit. Fin. R. 46. Hill. 25 Car. 2. *Madge v. Wheeler and May*.

(H) Disputes between Mortgagee and Creditors.

1. **I**F a man mortgages by a defective conveyance, and there are subsequent creditors, whose debts did not originally affect the land, equity will supply such defective conveyance against such subsequent incumbrances, who acquired a legal title afterwards; for since the *subsequent creditors* did not originally take the lands for their security, nor had in view an intention to affect them, when afterwards the lands are affected, and they come in under the very person that is obliged in conscience to make the defective security good, they stand in his place, and *shall be postponed to such defective conveyance*. Abr. Equ. Cases 320. (E) pl. 1. cites Mich. 1670. *Burgh v. Francis*.

2. *Redemption* was denied to creditors because of the length of time. Arg. 2 Chan. Cases 62. Trin. 33 Car. 2. cites Sir *Woollaston's Case*.—1 Chan. Cases 220. Hill. 23 & 24 Car. 2. S. P. *Roscarrick v. Barton*.

3. A. had judgment on a counterbond against the son and heir of B. the debtor, and had extended the lands which were mortgaged to C.—A. brought a bill to *discover incumbrances*, and was decreed to *redeem*; and the devisee of the son having borrowed more money of A. on a statute acknowledged to D. in trust for A. she was decreed to redeem against A. but should pay the statute as well as the judgment and mortgage. Fin. R. 51. Hill. 25 Car. 2. *Mole v. Franklin*.

4. A par-

4. A purchaser bought lands charged with a judgment and bought in mortgages to protect his purchase; but it was decreed that the *judgment creditor paying mortgages precedent* to his judgment shall redeem. Fin. R. 366. Trin. 30 Car. 2. Bacon v. Ashby.

5. After a decree to foreclose the mortgagor and some creditors whose debts were charged on the estate, a creditor pays off the mortgage and agrees with the rest that they should redeem him at a farther day, otherwise he should hold the lands absolutely; this gives the creditors a new redemption, and accordingly a redemption was decreed, tho' after 20 years possession and great improvements made, 800*l.* being laid out in buildings, and directed an account to be taken, and the defendant to be allow'd only necessary repairs and lasting improvements. Hill. 1682. Vern. 138. Exton v. Greaves.

This decree was founded principally on the first mortgagee's not having assigned the benefit of the decree for foreclosing the equity of redemption, but the mortgage only. Ibid.

6. Mortgagor becomes bankrupt; The assignees bring ejectment; the mortgagee refuses to enter, but suffers the bankrupt to take the profits to fence against the assignees with this mortgage; per North K. The mortgagee shall be charged with the profits from the delivery of the ejectment. Mich. 1684. Vern. 267. Chapman v. Tanner.

7. A. mortgaged to B. and then acknowledged 3 judgments to C. D. and E. for other monies due.—C. and D. gave notice to B. and desired B. to accept of his money due on the mortgage, which they said they were ready to pay him, and desired B. to appoint a time when, and they would pay him within a fortnight, to the intent that his mortgage being set aside they might take execution on their judgment, but proved not any money actually tendered; but afterwards B. exhibited a bill against A. and had a decree to foreclose, and after took an absolute conveyance from A. for a considerable sum of money, and now C. and D. had a decree against B. to pay them their money; but E. had no relief because he gave no notice in time of his judgment. Hill. 1 Jac. 2. 2 Chan. Cases 170. Greswold v. Marsham.

8. If a mortgagee after notice of a subsequent mortgage joins with the mortgagor in a sale of the lands to a stranger, the money receiv'd by either shall sink so much of the purchase-money. Mich. 1691. Ch. Prec. 30. Bentham v. Haincourt.

9. By 4 & 5 W. & M. cap. 20. §. 3. No judgment not docketed according to that act shall affect any lands as to purchasers or mortgagees &c.

10. Creditors of a mortgagor brought a bill to have the estate sold for payment of their debts, pending which suit the mortgagee got a decree to foreclose the mortgagor. The Court decreed the creditors to redeem on payment of principal

*[Quære if the words purchase-money, should not be mortgage money.]

interest and costs to the mortgagee, and referred to a master to take an account thereof, and that the land should be sold to pay the creditors. Trin. 11 Geo. 9 Mod. 153. Soley v. Salisbury.

[450]
See Fraud
(Q) &c.

(I) Disputes between Mortgagee and After-Purchasers.

2 Ch. Cases
98. 213.

1. **A.** Acknowledged a *statute* of 1500l. for payment of 800l. and interest to B. which being forfeited and lands extended at a certain annual value A. afterwards for a good valuable consideration settles the same lands in tail, and then borrows more money of B. and it was agreed by articles between A. and B. that this statute and extent should stand a security for the money borrowed. A. dies. The right of entail descends on the plaintiff C. and the 800l. with interest is satisfied by perception of profits or otherwise. Per tot. Cur. C. can have *no relief against the penalty of the statute*; for both the statute and settlement in tail were for *valuable considerations* and the money borrowed afterwards raises an equity for B. and the heir C. has an equity by the entail; yet because B. has *both law and equity*, and C. has *only equity* till the penalty of the statute is satisfy'd C. shall not be relieved till the penalty is levied according to the extended value, or by casual profits. But per omnes, B. should not be relieved in equity for any money lent since the settlement upon the credit of his former security; for then no purchaser could be safe. Mich. 14 Car. 2. Hard. 318. Hedworth v. Primate.

2. On a treaty of marriage between B. son of A. and M. daughter of G. H. there was a meeting at which was present J. S. who had a mortgage on lands then proposed to be settled by A. the mortgagor on B. his son and M. his intended wife. Upon which J. S. called A. out and reminded him of the mortgage but said nothing of it to G. H. Thereupon J. S. privately consented to A's settling the estate, and to take his personal security for the mortgage money, and then A. and G. H. in presence of J. S. agreed that the lands should be settled on B. and M. and the issue of that marriage, the remainder to any other sons which B. should have of any other wife, the remainder to A. in fee. About 12 years after J. S. brought ejectment as mortgagee, whereupon B. and M. exhibited their bill against J. S. and A. praying a perpetual injunction, Ld. C. Hardwicke declared that J. S. by concealing his mortgage was not intitled to any relief against the plaintiffs, nor would he make any decree over for J. S. against A. because both parties had examined him as a witness in the cause. His lordship decreed J. S. to assign the mortgage in trust for the benefit of the plaintiffs and the issue

of that marriage, but would not determine whether it was to be considered as fraudulent or not against the issue which B. might have by any other wife, and would reserve the consideration of that matter; he order'd J. S. to pay the costs both at law and in equity and also of the assignment, but without prejudice to his bringing any bill against A. Barn. Chan. Rep. 101. Pasch. 1740. Berrysford v. Millward.

(K) Disputes between *Tenant for Life and Remainder-man, &c.* of the Lands mortgaged.

1. *TENANT for life* must keep down the growing interest, as is the common rule in equity; per Cowper C. 3 Ch. R. 131. in Case of Orby v. Ld. Mohun.

2. Land mortgaged for 100l. was devised to A. for life, remainder to B. in fee, deviser made A. executor and left assets enough to pay the debts; B. prayed it might go to the payment of the mortgage; but the Court took a difference between *heir and devisee, and tho' the heir should be relieved in such case, yet devisee shall not; and decreed tenant for life to pay one-third, and he in remainder two-thirds to redeem. Chan. Cases 271. Hill. 27 & 28 Ca. 2. Cornish v. Mew.

* In a like case the heir was decreed by Ld. Somers to pay [451] two-thirds, and said that so it would have been if

mortgagee had took the profits during A's life. Mich. 1696. Ch. Prec. 62. Ballet v. Spranger.—Vern. 70.—2 Mod. 174.

3. A *jointress* paid off a mortgage; it was decreed that she should hold over till she and her executors should be repaid with interest. Hill. 27 & 28 Car. 2. Chan. Cases 271. cited as the Case of Bertue v. Stile.

Decreed accordingly. Pasch. 34 Car. 2. 2 Chan. Cases 100.

Brond v. Brond.—But *one third part was to be her own proportion. 2 Chan. Cases 100.—North K. said if the cause had come originally before him, and there had been assets sufficient, the husband having covenanted to pay the money, he would have decreed it clear to the wife. Hill. 1683. Vern. 214. S. C.

* 13 Car. 2. Chan. Rep. 218. Rowel v. Walley.—Mich. 32 Car. 2. Fin. R. 475. Pain v. Bromfal.

4. Lands in mortgage were devised to A. for life, remainder to B. in fee; A. takes an assignment of this mortgage in a trustee's name. B. *paying two thirds may come in and redeem; but in this case A. dying before the bill was brought, and having enjoyed the estate but one year only, his executor (the defendant) must make allowance only for the time that A. enjoyed the estate. Trin. 1686. Vern. 404. Clyatt v. Batteson.

S. C. cited. Mich. 1696. Chan. Prec. 62.—*Hill. 9 Ann. G. Equ. R. 30. Kitson v. Kitson.

5. A. devised lands incumbered to B for life, remainder to C. in fee. B. cuts down timber; decreed B. to pay two, and C. three fifths of the debts and B. to account for timber cut, and to be taken as part of the three-fifths to be paid by the

Ch. Prec. 44 S. C.—Upon a like point Ld. C. Parker said how equi-

tablesoever remainder-man. Pasch. 1692. 2 Vern. 267. James & al. v. Hales & al.

be to allow

two fifths in case of a tenant for life with remainder to him in fee after an intervening estate tail, and to allow the tenant in tail only three fifths, yet it was not the practice and would be dangerous and create uncertainty, and Mr. Goldborough the register said, he never knew a life valued at more than one third. Wms's Rep. 650. Pasch. 1720. Anon. — Or Hubert v. Fetherston. — A bill to redeem or foreclose was brought against tenant for life only of the equity of redemption, without making the remainder-men parties. The Court directed the defendant to bring a bill to have a sale made and the mortgage debt to be paid, and the surplus to be distributed amongst the tenant for life and remainder-men in proportion according to their several interests. 2 Vern. 117. Mich. 1689. Thynn v. Duvall.

6. A remainder-man can only force the tenant for life to keep the interest down if the land is charged, but he cannot compel him to redeem directly, tho' indirectly he may by purchasing in the mortgage, then to pay but one third or part with the possession; agreed per Sir Tho. Powis. Arg. Pasch. 7 Ann. G. Equ. R. 69. in Case of Hungerford v. Hungerford.

7. Tenant for life and remainder-man joined in mortgaging lands; they both covenanted and gave bond to pay the money. tenant for life dies; Per Ld. Cowper, if remainder-man pays the money and takes up the bond or gets the covenant assigned, he may prefer his bill against the executors of the tenant for life but not else. Pasch. 7 Ann. G. Equ. R. 69. in Case of Hungerford v. Hungerford.

In this case it was argued, that to have the debt diminished by sale of timber, (which belongs solely to the reversioner) would be to make his particular estate [452] discharge a debt, to which the tenant for life was liable in proportion.

And suppose that the value of the timber cut down was equal to the debt on the estate, and

8. A. a papist seised in jure uxoris, and being intitled to be tenant by the curtesy by his having issue the plaintiff joined in a fine with his wife, and made a mortgage with a proviso, that on payment of the mortgage money the same should be re-conveyed to A. for life without impeachment of waste. A. being afterwards attainted of treason, his estate was vested in commissioners for benefit of the publick. B. the eldest son of A. and M. his wife claimed the reversion free and discharged of a committal of waste, which was allowed, and then the commissioners conveyed A's estate with all privileges thereto belonging to W. R. and T. S. who afterwards bought in the mortgage and cut down a large quantity of timber. B. the reversioner prayed an injunction, and that the money raised by sale of the timber should be for his benefit. It was argued for him to be the constant rule of chancery, That tenant for life out of the annual profits of the estate must keep down the interest, as the income of the estate is so much higher by the debt not being paid off; for were the debt to be paid off, the tenant for life would be obliged to pay a proportion now settled to be one third, and the reversioner two thirds. It was decreed by Mr. Baron Price, that B. the reversioner should have it free from committal of waste; for that A. being a papist could take no larger estate under the fine than he had before, tho' as large an one he might; That an account should be taken

taken by the master of what is cut down, and the money to be applied in the first place to the payment of the interest, and then to the sinking of the mortgage, and an injunction to stay any more selling. Cases in Chancery in Ld. King's Time, 30. Trin. 11 Geo. 1. Withrington v. Banks and Cotesworth,

to be applied to the discharge of it, in that case the tenant for life would be

no more charged with payment of the interest of the money, which the law bound him to, and the reversioner would have paid the whole debt when the law charged him but with a part; and this by the single act of the mortgagor, who in this case is one and the same with the mortgagee; and that this was an artifice to diminish the charge on the tenant for life, and throw it on the reversioner. Ibid. 31.

(L) Disputes between Mortgagee and Assignee of Mortgage.

1. **MORTGAGEE** with notice of a trust assigns over to the nominee of a purchaser, of which trust the purchaser had notice likewise before the deeds executed, or his money paid; The Court left the purchaser at liberty to bring his bill against the mortgagee for the money paid him on the assignment of the mortgagee. Vern. 487. Mich. 1687. Walley v. Walley.

2. A. settles land mortgaged to B. as a jointure on M. whom he after married, remainder to the heirs of his body by the said M. A. afterwards makes another mortgage of the same land to C. and makes oath it was free of incumbrances. A. dies intestate, leaving a son by M. and leaves personal estate. D. administers during the son's minority, and out of the personal estate of A. pays off B. and takes an assignment in trust for the son. Master of the Rolls decreed C's debt to be satisfied as far as assets of A. and that D. should not be allowed as against C. the money paid for the assignment of B's mortgage. 2 Vern. 304. Mich. 1693. Fox v. Crane and Wight.

(M) Proviso. To make Interest Principal, or to enlarge or lessen it.

1. **INTEREST** of money on a mortgage was made at 5l. per cent. but if not punctually paid, then at * 6l. The interest is very much in arrear. Defendant was decreed to pay but 5l. per cent. the reservation of 6l. being but as a Nomine Poenæ: 2 Vern. 289. Pasch. 1693. Lady Hollis v. Wife.

S.P. 2 Vern. 316. Pasch. 1694. Shode v. Parker. But the Court took a difference where the

reversion of 6l. per cent. was to be reduced to 5l. if paid duly; there he must comply with the times of payment, and says it was so decreed in * Lord Hallifax's Case; but where the interest is to be increased if not paid at the day, that is but in name of a penalty, and relievable in equity. But the Reporter says, Quære tamen; for the agreement of the parties seems to be the same in either case, and whether interest is to be reduced upon

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compliance with the times of payment, or to be advanced in default thereof, seems only to be a difference in the expressing one and the same thing. *Ibid.*—— In *Ld. Hallifax's Case*, the agreement to take 5*l.* per cent. was by a distinct deed; but quære, How that varies the case. *Ch. Prec.* 161. in a note there.

But where a mortgage was at 5*l.* per cent. with *covenant to pay 6*l.* on default of paying the interest for 60 days*, it was decreed, that from default he should pay 6*l.* and that this covenant was the agreement of the parties, and not to be relieved against as a penalty. 2 *Vern.* 134 *Hill.* 1690. *Marquiss of Hallifax v. Higgins.*

* This is not an unreasonable penalty, and it is the defendant's own agreement; and per *Wright K.* decreed to pay 6*l.* per cent. *Chan. Prec.* 16*c.* *Pasch.* 1701. *Jory v. Cox.*

Though the Court will allow a mortgage in this manner, viz. That 5*l.* per cent. may be reserved, with a proviso, that if the interest be paid within a certain time after it is due, the mortgagee will accept 4*l.* per cent. and that shall be good; yet if a mortgage is made with reservation of 4*l.* per cent. interest with a proviso, that upon non-payment thereof within a certain time after it is due, he shall pay 5*l.* per cent. such proviso will not be good; and that has been several times determined; Per *Ld. C. Hardwick.* *Barn. Chan. Rep.* 148. *Pasch.* 1741. in *Case of Walmesley v. Booth.*

Ld. C. Parker conceived, that to make interest principal, it is requisite that there should be a writing by the parties, for as much as the estate in the land is to be charged therewith. *Wms's Rep.* 653, *Trin.* 1720. in *Case of Brown v. Barkham.*

2. Proviso was, that if the interest was behind for six months, that then that interest should be accounted principal, and carry interest; Per *Cowper Ch.* It is a vain clause, and no precedent had ever carried the advance of interest so far; and an agreement made at the time of the mortgage will not be sufficient to make future interest principal. But to make interest principal, it is requisite that interest should be first grown due, and then an agreement concerning it may make it principal. 1707. 2 *Salk.* 449. *Ld. Ossulton v. Ld. Yarmouth.*

3. A mortgage was made by A. to B. at 6*l.* per cent. proviso to accept 5*l.* per cent. if paid within three months after it is due. *Ld. C. Parker* said, that this is generally looked upon as penalty, & in terrorem, and to be relieved against if only a short time has happened, but not in case of a long arrear of interest. But tho' in the principal case, there was a great Arrear, he thought this 1*l.* per cent. to be a satisfaction, and a considerable one too, and therefore refused to make it principal, tho' A. by letter had allowed the account desiring forbearance, and promised satisfaction; but declared, that if there had not been such penalty of 6*l.* per cent. instead of 5*l.* and a great arrear of interest incurred, the court would, on such a promise in writing to make a satisfaction for forbearance, have given the mortgagee some allowance in this respect. *Wms's Rep.* 652. *Trin.* 1720. *Brown v. Barkham.*

(N) Payment or Tender. By whom.

In this case the law enables the heir, that was not named, to perform

1. IF a feoffment be made in mortgage upon condition that the feoffor shall pay such a sum at such a day &c. altho' the feoffor dieth before the day of payment &c. yet if the heir of the feoffor pay the same sum at the same day to the feoffee, or tender to him the money, and the feoffee refuse to receive it, then

then may the heir enter into the land; and yet the condition is, that if the feoffor shall pay such a sum at such a day &c. not making mention in the condition of any payment to be made by his heir; but because the heir hath interest of right in the condition &c. and the *intent* was only that the money should be paid at the day assessed &c. and the feoffee hath no more loss if it be paid by the heir, than if it were paid by the father &c. And for this cause, if the heir pay the money or tender the money at the day assessed &c. and the other refuses it, he may enter. Co. Litt. S. 334.

the condition for four causes. 1st. There is a day limited, so as the heir comes within the time limited by the condition; for

otherwise he would not do it. 2dly. The condition descends unto the heir, and therefore the law, that gives him an interest in the condition, gives him ability to perform it. 3dly. The feoffee receives no damage thereby. 4thly. The intent and true meaning of the condition shall be performed. And where it is here said, that the heir may tender *Al jour assesse* &c. herein is implied, that the executors and administrators of the mortgagor, or in default of them, the ordinary may also tender. And the law enables the heir to perform the condition, lest the inheritance should be lost. Co. Litt. 205. b. [454]

2. But if a stranger of his own head, who hath not any interest &c. will tender the aforesaid money to the feoffee at the day appointed, the feoffee is not bound to receive it. Co. Litt. S. 334.

A stranger cannot tender the money to be paid upon the mortgage;

for it ought to be by one who has interest in the land. Ow. 34, Winter v. Loveday.—Godb. 39. Arg. in Cropp's Case.

But if any stranger in the name of the mortgagor or his heir (without consent or privity) tender the money, and the mortgage accepts it; this is a good satisfaction, and the mortgagor, or his heir agreeing thereto, may re-enter into the land; for *omnis ratihabitio retrotrahitur & mandato æquiparatur*, But the mortgagor or his heir may disagree thereunto if he will. Co. Litt. 206. b. 207.

3. If the mortgagor dies, his heir being within age of 14 years, (the land being holden in socage) the next of kin, to whom the land cannot descend, being his guardian in socage, may tender in the name of the heir, because he has an interest as guardian in socage. So if the heir be within 21 years, and the land is holden by knight's service, the lord of whom the land is holden may make the tender for his interest which he shall have when the condition is performed: for these in respect of their interest are not accounted strangers. Co. Litt. 206. b.

A tender by the mother of an infant is not good unless she be guardian in socage, and the infant is under 14 years of age; but if the infant

is above 14 years old, and he assents to the tender, such tender shall be sufficient. Mo. 222. Hill. 28 Eliz. Watkins v. Ashwell.—Cro. E. 132. S. C.—And because no age was proved, but only that he was within age, it shall not be intended that he was under 14, and therefore the court advised the party to begin de novo, and that it may be found that he was under 14. Ow. 137. Watkins v. Astwick. S. C.—The verdict finding infancy generally, and not finding him under 14, the tender was adjudged not good. Le. 34. S. C.

4. But if the heir be an idiot of what age soever, any man may make the tender for him, in respect of his absolute disability, and the law in this case is grounded upon charity, and so in like cases. Co. Litt. 206. b.

(O) Payment

(O) Payment or Tender, to whom it may be.

But the words of the condition may be such, as the payment shall be made to the heir. As if the condition were, that if the feoffor pay to the feoffee

1. IF the feoffee in mortgage before the day of payment makes his executors and dies, and his heir entereth into the land as he ought &c. The feoffor ought to pay the money at the day appointed to the executors, and not to the heir of the feoffee; because the money at the beginning trencched to the feoffee in manner as a duty, and shall be intended that the estate was made by reason of the lending the money by the feoffee, or for some other duty; and therefore the payment shall not be made to the heir, as it seemeth. Co. Litt. S. 339.

or his heirs such a sum, at such a day &c. There after the death of the feoffee, if he dieth before the day limited, the payment ought to be made to the heir at the day appointed. Co. Litt. S. 339. 5 Rep. 96. b. Goodale's Case.——But if the condition be to pay money to the feoffee his heirs, or executors. The feoffor has election to pay it either to the heir or to the executors. Co. Litt. 210. a.

But where the feoffee made a feoffment over, and died, the money should be paid to the second feoffee, who is the assignee;

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per Pop-
ham Ch. J.
and Clench
J. Poph.
100. in
case of
Goodale v.
Wiatt.

2. If a man makes a feoffment in fee upon condition, That the feoffee shall pay to the feoffor his heirs or assigns 20l. at such a day, and before the day the feoffor makes his executors, and dies; the feoffee may pay the same, either to the heir, or executors; for they are his assigns in law to this intent. But if a man make a feoffment in fee, upon condition, that if the feoffor pay to the feoffee, his heirs or assigns 20l. before such a feast, and before the feast the feoffee makes his executors, and dies. The feoffee ought to pay the money to the heir, and not to the executors; for the executors in this case are no assignees in law. And the reason of this diversity is this; for that in the first case, the law must of necessity find out assigns; because there cannot be any assigns in deed, for the feoffor has but a bare condition, and no estate in the land which he can assign over. But in the second case, the feoffee has an estate in the land which he may assign over, and where there may be assignees in deed, the law shall never seek out and appoint any assigns in law. And albeit the feoffee made no assignment of the estate, yet the executors cannot be assignees; because assignees were only intended by the condition to be assignees of the estate. Co. Litt. 210. says, it was so resolved Mich. 23 & 24 Eliz. Randall v. Browne.

3. In case of joint mortgagees, there shall be no survivorship, where the money lent appears to be with intention that each should have his money and interest again. Chan. Rep. 57. 17 Car. 1. Petty v. Styward.

3 Chan.
Rep. 94.
S. C. in al-
most the
same words.

4. J. S. mortgaged lands to A. in fee, to be void on payment of 1000l. and interest at Michaelmas, and covenanted to pay the money, and gave a bond for performance of covenants. The money was not paid, A. died, leaving B. his heir at law. Upon

Upon a bill by B. J. S. was decreed to pay the money at a day to B. or to be foreclosed of the equity of redemption. Some considerable time afterwards, it was discovered, that A. had made a will, and C. executor, and the mortgage money given to C.—C. proved the will. J. S. before the time of payment lapsed exhibited a bill of review against B. and the defendants setting forth all this matter, and that C. the executor was not party or privy to the former decree, nor was it then known that there was a will or executor, praying to be relieved against the decree, and that the court would direct to whom the money should be paid, and that the bond be delivered up &c. The defendants plead the former decree: and on arguing the plea, the court held it an extraordinary case, and that, if C. the executor had the right both by the covenant in the mortgage, and by the bond and will, the court could not take it from him. And that if B. the heir should have the lands in mortgage by virtue of a decree, J. S. the plaintiff would be likewise liable to C. the executor for the money upon the bond and covenant, and so to double payment. And that a bill of review would not lie in this case, because that must always be between the same parties to the original bill. Now C. was no party to that bill; and as to the mortgaged lands, they being forfeited since the decree, J. S. cannot have them again. And if C. the executor had any right to the money, he might obtain a decree against B. the heir of A. for the land itself, or for the price of it, if sold; yet the Court would not put C. the executor to take that course, because he had a remedy at law upon the bond and covenant, which the court could not hinder him to prosecute. However he was ordered to answer without prejudice to his former plea; and it was likewise * ordered, that B. bring the mortgage deed and bond into court, and that he sell the land, and bring the money likewise into court, there to remain whilst he and C. the executor inter-plead for the same. Nels. Ch. R. 52. before Lds Commissioners Widdrington, Tyrrel, and Fountaine, Anno. 1659. Earl of Carlisle v. Gober.

5. The Question was, whether the mortgage money should be paid to the heir or executor of the mortgagee: and it was for the heir insisted, That it was ruled in a case between Tilly and Egerton, in Michaelmas 1660, heard by the Ld. Chaucellor, assisted by the Ld. Bridgman, there being no defect of assets in the executor's hands, that the heir should have the money, who is to convey the estate; and this was said to be the first precedent of this kind. But the court would see precedents. And afterwards, about Michaelmas or Hilary term, 1667, the principal case was heard before the Ld. Keeper Bridgman, where the order in the case of Egerton was produced; but in the principal case there appeared to be a Bond for payment of the mortgage money, which goes to

* 3 Chan. Rep. 96. S. C. introduces this order with saying thus, viz. "Afterwards at another day, the plaintiff moved to be admitted to a bill of review. Ordered &c."

Ibid. says it was adjudged by the Lord Keeper. 11 Car. 1. Saint John v. Grabham. That the heir, and not the executor should have the money, it being payable by the

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condition to
the heirs or
assigns of
the mort-
gagee.

the executors; and the condition of the redemption was upon payment of the money to the executors &c. (without naming the heir) So it was ruled in the principal case, that the money should be paid to the executor; but the Lord Keeper said, that if the condition of the redemption had been to pay the money to the heir or executor, and no bond were in the case, nor no want of assets of the personal estate, it might have been otherwise. And in the case of Egerton, in reading the order it did not appear how the condition was penned; but the court now took it, that the money was payable to the heir by the condition. Chan. Cases 88. Hill. 19 Car. 2. Smith v. Smoult.

6. A mortgage was made in fee, which descended to the heir at law, and the money 10 years since paid to him. The executor of the mortgagee preferred his bill, and had a decree for the money, but without interest. Though the proviso was to pay to the mortgagee, his heirs, or executors; yet when the day is past, it is as much as if no person had been expressed, and then equity shall follow the law, and appoint it to the executor. 2 Vent. 348. Trin. 32 Car. 2. Turner's Case.

7. A. having a rent-charge to him and his assigns for three Lives of 160l. a year mortgaged the same to J. S. his executors, administrators, and assigns, to have &c. to him, his heirs, and assigns, during the three lives of the original nominees upon this special trust, that J. S. his executors, administrators, and assigns, shall enjoy 100l. a year out of it to their own proper use, till the mortgage money satisfied, if the three lives last so long. J. S. made W. R. executor, but no witnesses subscribed the will. W. R. brought a bill against T. S. the heir at law of J. S. and others to have the benefit of so much of the rent-charge as J. S. was intitled to. The master of the Rolls made two points: First, what sort of legal estate J. S. had in this rent-charge? viz. whether it would go to his heirs or his executors for the three lives? and if to his heirs, then, whether the trust of it does not belong to his executors? He said, he could not find one single authority which would come up to the first point, this being an estate pur autre vie, that the general rules as to the office an habendum are, that it is to explain, limit, and declare the quantum of the estate to pass by the deed; it has never been disputed but it will carry the limitation of the estate further than the premises of the deed did. On the other hand it is clear, that the habendum never abridges the estate granted by the premises; it may indeed vary and alter it. As if an estate be granted to A. and the heirs of his body, habendum to him and his heirs, this is a fee simple; some books indeed have said, that this is only an estate tail with a remainder in fee, but he said it is difficult to maintain that opinion, and he thought

thought it not law. That the particular nature of the present case is such, that a grant of this kind to J. S. and his executors, is the same as to J. S. and his heirs; for in both these cases being of an *estate pur auter vie*, *the heirs and executors do not take as representatives to the party, but as special occupants*. And therefore it has been held, that if lands are granted to A. and his heirs for three lives, he may grant it to B. and his executors for those lives; so if granted to A. and his executors for three lives, he may grant it to B. and his heirs during those lives; whence it follows, that if one of these limitations is in the premisses, and the other in the habendum, the habendum shall take place. As if the premisses are to A. and his executors during the life of B. habendum to A. and his heirs during B's life, the heirs shall have the benefit of the estate. So if the premisses are to A. and his heirs during B's life, habendum to A. and his executors during B's life, the executors shall have the benefit of it; because the habendum does not attempt to give a less or larger estate than contained in the premisses, but is merely explanatory. And tho' before the statute of frauds and perjuries no grant of a rent pur auter vie was good longer than for the life of the grantee, because it lay not in occupancy, yet a rent is within the relief of the statute of frauds, as well as any other sort of inheritance. So that the matter of the legal estate depends upon the habendum, which he thought ought to take place for the reasons before mentioned, and consequently, that the legal estate in this rent belonged to the heir at law; but however, that within the meaning of the trust of this deed, the executor of J. S. is intitled to the benefit of it, it being expressly declared, that the mortgage was made upon this special trust, that J. S. the mortgagee, his executors, administrators, and assigns, should enjoy the benefit of 100l. a year part of the rent-charge to their own use, till the mortgage was satisfied, if the three lives so long continued; that the only thing that made any difficulty in this part of the case was, that it is pretty hard to conceive how a man and his heirs should be trustees for himself and his executors, but that this is the case of every mortgage that is made in fee. And he decreed accordingly. Barn. Chan. Rep. 46. to 50. Pasch. 1740. Kendal v. Micfeild. [457]

(O. 2) Payment or Tender. *What is Good.*

1. **T**HE payment ought to be *real and not in shew* and appearance; for if it be agreed between the feoffor and the executors of the feoffee, that the feoffor shall pay to the executors but part of the money, and that yet in appearance the whole sum shall be paid, and that the residue shall be repaid, and accordingly at the day and place the whole

5 Reg. 96 b.
Gondale's
case.—
Poph. 99.
S. C.

whole sum is paid, and after the residue is re-paid, this is no performance of the condition ; for the estate shall not be divested out of the heir, who is a third person without a true and effectual payment, and not a shadow and colour of payment ; and the agreement precedent doth guide the payment subsequent. Co. Litt. 209. b.

3. A. indebted by mortgage to B. in 100*l.* *paid the money*; B. ordered his servant to put it into his closet, who did so. A. then demanded his writings, which B. not delivering, A. *required his 100*l.* again*, which the servant by B's order *re-delivered to A.* and A. took and carry'd it away. Resolved that this was a *good payment* and discharge of the mortgage, and tho' A. demanded it again as his own money, yet it shall not avoid that which was absolutely paid ; but the mortgage remains absolutely discharged, and the money was the plaintiff's, and being not delivered to B. otherwise or upon any good consideration, A. received them as B's money, and is accountable to B. for them. Cro. E. 614. *Hewer v. Bartholomew.*

(P) *Discharged.* By what Act.?

1. J. S. mortgaged land to A. for 500 years to secure 3000*l.* and a *bond was given for performance of covenants.* The writings were left in a third person's hands. Some time afterwards J. S. *bringing the box in which were the mortgage and bond to A.* in the presence of M. the mother of J. S. who were relations, A. put back the writings with his hand, and said, *Take back the writings I freely forgive you the debt ;* and then said to M. " I always told you I would " be kind to your son ; now you see I am as good as my " word."——A. died, leaving B. his son, who brought his bill as representative of A. to compel payment, or that J. S. might be foreclosed. Ld. C. Hardwicke was of opinion, That in case A. forgave the debt in the manner as sworn by the defendant, the plaintiff could not be intitled to relief, [458] (supposing the statute of frauds to be out of the case) and that the bill must be dismissed. And that this being a *mortgaged interest in land*, he thought *this evidence allowable consistent with the statute of frauds and perjuries.* That what is there said, that no interest in lands any longer than for three years shall pass without writing, nor any trust in them for a longer time, unless it arises by operation of law ; and so of a devise of real estates admits of a *difference both in law and equity between absolute estates in fee, or for a term for years and conditional estates for security of money.* In the first case it cannot be admitted that parol evidence of the gift of deeds shall convey the land itself. But a mortgage is considered only as a security for money, the land is the accident attending

ing upon the other, and when the debt is discharged, the interest in the lands follows of course. In law the interest in the lands is thereby defeated, and *in equity a trust arises for the benefit of the mortgagor*. And his Lordship thought that such evidence as above (so far as any credit can be given to it) ought to be received, as proving a gift or release of the debt; and if an obligee delivers up a bond with intent to discharge the debt, the debt will certainly be thereby discharged; and if the bond is discharged in the present case, the mortgage will be discharged with it; and directed an *issue, whether the mortgagee did use such words or not*. Barn. Chan. Rep. 90. Pasch. 1740. Richards v. Syms.

2. In *ejectment* where a title is made under a mortgage, if *evidence is given that the debt is satisfied*, this is considered as defeating the estate in the land which the mortgagee had, and in such cases, especially where the mortgage is ancient, the court will presume that the mortgage was paid at the day, and will direct the jury to find accordingly, unless it appears clearly that the money could not be paid at the day. In these cases no writing is necessary, which shews that even the law considers the debt as the principal, and the land as an accident only. But equity goes further, and in all cases says, that *where the debt appears to be satisfied, there arises a trust by operation of law for the benefit of the mortgagor*, and this is within the exception in the statute of frauds of trusts arising by operation of law. And in these sort of cases the court receives any kind of evidence of payment. Per Ld. C. Hardwicke. Barn. Chan. Rep. 93. Pasch. 1740. in case of Richards v. Syms.

* And therefore if one partner makes a mortgage to another, and the mortgagor agreed that the other should take a certain part of the profits of the partnership in discharge of the mortgage, that of itself would discharge it. Per Ld. C. Hardwicke. Ibid.

(Q) Redemption. By whom.

1. **T**HERE was a proviso in a mortgage, that the mortgagor, his heirs, executors, or administrators, should have power to redeem the lands; yet a redemption may be by an assignee of the mortgagor, tho' he is neither heir, executor, or administrator. Toth. 160. cites 11 Car. Porter v. . . .

2. Devisee shall redeem, and not the heir. Chan. Rep. 190. Verr. R. 12 Car. 2. Philips v. Hele.

v. Dunch.—357. S. C. cited Hill. 1685.

3. A decree to foreclose tenant in tail shall bind his issue as to an equity of redemption, because that is a right set up only in a court of equity, and so may there be extinguished. Per Hale Ch. J. Chan. Cases 220. Hill. 23 & 24 Car. 2. Roscarrick v. Barton.

4. As to the admitting persons to redeem, Lord Keeper made great difference between such as come to redeem who are

are *no parties to the mortgage*, and those that are *parties to the mortgage*. Chan. Cases 220. 23 & 24 Car. 2. Roscarrick v. Barton.

5. *Voluntary conveyance* was made to A. with power of *revocation* on tender of 1s. The tender was made, but not at the place appointed. Afterwards the grantor makes a mortgage to B. for 500l. of the same lands, and after that an absolute assignment for 750l. more paid to the grantor. The grantee laid out money in repairs and building. It was decreed, that A. should redeem *paying all the disbursement* of building and repairs, and B. to account for *all wilful spoils and wastes* done; but if A. failed of payment, then B. to enjoy against A. and all claiming under him. This decree was affirmed. Fin. R. 38. Mich. 25 Car. 2. Thorne v. Newman.

6. A Purchaser bought lands charged with a judgment, and bought in mortgages to protect his purchase; but it was decreed, that the *judgment creditor paying mortgages precedent* to his judgment shall redeem. Fin. R. 366. Trin. 30 Car. 2. Bacon v. Ashby.

7. A mortgage is *made redeemable during the life of the mortgagor only*, yet his heirs shall redeem. Per Ld. Nottingham C. Vern. 7. Trin. 33 Car. 2. * Newcomb v. Bonham.

This was made with intent of a settlement of his estate, besides the consideration; and in this case mortgagor was a *near relation to mortgagee*, and agreed, that if he had no issue male, the mortgagee should have the land. See Mich. 1683. Vern. 193. in Case of Howard v. Harris. — 2 Chan. Cases 147. S. C. But this decree was reversed by Ld. Keeper North. Vern. 232. Pasch. 1684. — 2 Chan. Cases 148. the Case of Killington v. Green, cited by Mr. Keck, as decreed so in 1678. — The reversal affirmed in parliament. 1 & 2 W. & M. 2 Vent. 365. — 2 Ch. Cases 58. S. C.

8. Tho' the redemption be *limited to the mortgagor, and the heirs males of his body*, yet this will not exclude the heir general, but that he may redeem. Vern. 190. Mich. 1683. Howard v. Harris. — But if a deed of entail is set forth, the heir general shall not redeem without shewing that the tail is dock'd. Per Ld. North Vern. 182. Trin. 1683. Lomax v. Bird.

9. He that comes to redeem a mortgage must *shew a title to the equity of redemption*. Vern. 182. Trin. 1683. Lomax v. Bird.

10. A *reversion* naturally attracts the redemption; as if a man marries a *jointress of houses* which are burnt down, and they borrow 1500l. to rebuild, and levy a fine sur concessit, and * by deed between the husband and consuee the *equity of redemption is reserved to the husband and his heirs*; he lays out 3000l. in building and dies, decreed the wife and not the heir to redeem. Vern. 213. Hill. 1683. Brend v. Brend.

* By parol agreement between the husband and wife the wife was to redeem. 2 Chan. Cases 99. Pasch. 34 Car. 2. S. C. — Vern. 33.

11. One that *claims under a voluntary conveyance* may redeem a mortgage; Arg. Vern. 193. Mich. 1683. in Case of Howard v. Harris.

S. P. Chan.
Cases 59.
Mich. 16
Car. 2.

Rand v. Cartwright.

12. It was insisted that the wife for her *dower* is in law in the per, by her husband, and shall be intitled to clear all incumbrances, as well, and more than the husband; Arg. 2 Chan. Cases 172. Hill. 1 Jac. 2. Bodmin v. Vandebenden.

Arg. Vern.
357. S. C.
and P.

13. A. is bound with his father for the debts of the father; the father enters into a *statute to pay the debts and indemnify the son*; a creditor gives up his bond and takes a mortgage from the father; decreed that the defendants should redeem, or be foreclosed and a perpetual injunction against the statute; per Master of the Rolls. 2 Vern. 39. Hill. 1688. Legriel v. Barker, &c.

14. Where the equity of redemption is on a *mortgage in fee*, there a *bond creditor* shall never be let in, because after the debt is paid the lands are vested in the heir; * but secus, where a term is mortgaged; for the equity of redemption of a *term for years* comes to the executor, and in such case a bond creditor shall be let in, because if the term itself should be reconveyed it would be *assets* in his hands; Arg. N. Ch. R. 167. Mich. 1690. in Case of Baden v. E. Pembroke.

N. Ch. R.
183. Mich.
1693 contra Burgh
v. Francis.
[460]
This difference was
admitted
Arg. Vern.
410. Mich.

1686. and said to be adjudged with advice of the judges in the case of Bennet v. Box.
* S. P. 2 Ch. R. 360. 1 Jac. 2 Hallily v. Kirtland.

15. A. for 80l. conveys *absolutely* to B.—A. brings a bill to redeem; B. insists that the grant was absolute, but *confessed it was a trust* that after the principal and interest paid B. should stand seised *for A's wife and children*; plaintiff replies to the answer but no proof of the trust and therefore it was insisted that the husband should redeem; but decreed a trust for the wife and children. 2 Vern. 288. Pasch. 1693. Hampton v. Spencer.

16. If a man enters into a *bond*, in which he binds himself and his heirs, and dies, leaving a *real estate* to descend to his heir, *subject to a mortgage for years*, and the heir sells the equity of redemption; the *obligee* cannot redeem the mortgage *without first having a judgment at law against the heir*. Abr. Equ. Cases 315. Pasch. 1702. Bateman v. Bateman.

17. Bond was given by the husband to the wife just before the marriage to leave her 1000l. if she survived him; baron dies intestate leaving *freehold and copyhold in mortgage to A*. The wife administers and brought a bill against the heir and mortgagee to redeem, and Lord Wright decreed her to redeem both; and it was said that tho' on payment of what is due on the mortgage, the heir will have the copyhold from her, yet the freehold would be charged till the bond was satisfied. Ch. Prec. 237. Hill. 1704. Acton v. Acton.

18. *Subsequent incumbrances by judgment*, and other incumbrances may redeem the first mortgage, tho' the mortgagor is foreclosed by decree; and the account taken in the suit where such decree was obtained, tho' taken in an adversary way, will not bind the subsequent incumbrancers. 2 Vern. 663. Trin. 1710 Morrett and al. Western.

19. A. having chambers in Gray's Inn mortgaged them to J. S.—A. d.ed, leaving B. a son who was his administrator but no member of the society; B. brought a bill to redeem; it was objected that B. was utterly incapable of having the chambers by the rules of the society, which are that none can have chambers but such as are members of the inn; but the Lord Chancellor said, that tho' B. the plaintiff by the rules of the house is not capable of chambers, yet they shall be to him or his appointee. Select Cases in Chan. in Lord King's Time 55. Trin. 1726. Rakestraw.v. Brewer.

20. Land mortgaged for two several terms of 1000 Years each was afterwards settled on A. in tail, remainder to B. in tail, remainder to A. in fee, by which A. first and B. afterwards had an equity of redemption incident to their estates; A. by will appoints the mortgage to be paid off, and then the mortgage term to be assigned to M. and by the same will devised all his lands (being also seised in fee of other lands) to C. and his heirs; by this the reversion passes of the mortgaged premises. And the estate tail, and the remainders in tail, being spent by the death of A. and B. without issue the question was, if the equity of redemption, that was incident to the reversion in fee of A. passed to M. by the will, and was thereby severed from the reversion? and decreed it was not, per King C. Raymond Ch. J. and Denton J. and that she was only in the place of the mortgagees and that C. should be let in to redeem. Gibb. 99. Mich. 3 Geo. 2. Amhurst v. Litton.

[461] 21. In the case of Franklyn v. Fern. Pasch. 1740. it was said by Parker J. who sat for the Ld. Chancellor; that the rules laid down in the case of Bickley v. Dorrington, and in that of Monk v. Pomfret, are very right, viz. that in general no person shall be allowed to come into equity for a redemption but he that has the legal estate of the mortgagor; so if an executor is willing to get in the debts of the testator, there is no foundation for a creditor to bring a bill for that purpose; and therefore in general, where there are proper persons to get in the estate of another, a court of equity will not suffer either the creditors of the testator, or of a bankrupt [which was the principal case, and on which the question arose] to bring a bill in equity in order to get in that estate; but if an executor or assignee, will collude with a debtor, there is no doubt but a creditor may bring his bill in order to take care of that estate, and charge the assignees or executors with such collusion; that in the principal case the creditors of the bankrupt met to consider if proper for the assignees to bring a bill

a bill to redeem a supposed mortgage which the majority, thought it was not ; so that the assignees could not by the statute of 5 Geo. 2. bring a bill ; wherefore a bill brought *by the minor part of the bankrupt's creditors* against the supposed mortgagee and the assignees of the bankrupt's estate was held to be well brought ; and that if the assignees refuse to bring a bill which is for the benefit of the bankrupt estate any creditor may bring such bill, under peril of costs ; and decreed the assignees to have liberty to redeem in the first place, and in their default the plaintiffs to do it. Barn. Chan. Rep. 30.

(Q. 2) Redemption. *Against whom.*

1. **A** Power of redemption is an equitable right inherent in the land, and binds *all persons in the post*, or otherwise ; because it is an ancient right which the party is intitled to in equity ; per Hale Ch. B. Hard. 469. Trin. 19 Car. 2. in Case of Pawlett v. Attorney General.

2. In natural justice redemption of a mortgage lies against *the king* ; per Hale Ch. B. Hard. 467. Trin. 19 Car. 2. in Case of Pawlett v. the Attorney General.

(R) Redemption. *In what Cases.*

See R. Scheat
(K)

1. **M**ONEY secured on a mortgage *lease*, tho' not paid at the day, but *after*, yet the lease ought to be void in equity, as well as on a legal payment it would have been void in law. Chan. R. 20. i Car. 1. Emanuel College v. Evans.

2. A. mortgaged lands to B. and then *articles to sell them to C.* free of incumbrances for 250*l.* C. paid A. 50*l.* of the money, and afterwards *A. released to B. the condition of redemption* ; and pending a bill by C. A. released to B. all his right in and to the said lands ; but no money or other valuable consideration appeared to have been given for either of these releases. Decreed the releases to be set aside. Hill. 14 & 15 Car. 2. Hard. 320. Hill v. Worsely and Rogison.

3. Ld. Chancellor took a difference between a *lease to commence after failure of payment*, and a mortgage with a condition subsequent, as to the same being subject to a redemption. See 2 Chan. Rep. 53, 54. 22 Car. 2. White v. Ewens.

4. A decree to foreclose *tenant in tail* shall bind his issue as to an equity of redemption ; because that is a right set up only in a court of equity, and so may there be extinguished ; per Hales Ch. J. Chan. Cases 220. Hill. 23 & 24 Car. 2. Roscarrick v. Barton.

Otherwise a
release and
length of
time had

[462]

been a good
plea, and
was allowed,
tho' the

mortgage money was not more than a quarter part of the value. 29 Car. 2. 2. Ch. R. 131.
Nance v. Coke.

5. Mortgagor on taking up more money on the mortgaged lands *released the equity of redemption* to the mortgagee and died; but it appearing by letters, papers and other proofs, that the mortgagee *offer'd* a redemption, and to take his whole principal and interest, the same was decreed accordingly on a bill by the heir of the mortgagor, and an *account directed*. Hill. 29 Car. 2. Fin. R. 284. Seymour v. Tindal & al.

6. A. *surrendered a copyhold* to B. and his heirs *without any condition* mentioned in the surrender, but it was in consideration of 100l. lent by B. to A. and for further security thereof A. gave B. a judgment for 200l. And by a *note signed by A. and B.* dated before the surrender it was agreed that B. on *payment* of the money should *surrender back* the copyhold and acknowledge satisfaction on the judgment; B. was admitted, and devised it by his will to several persons, and they afterwards disposed of the same; decreed a *redemption*. Trin. 30 Car. 2. Fin. R. 376. Clench and Wife v. Witherly and Hobert.

It was like-
wise proved
that A's
heir at law
had offended
him and he
had declar'd
that she
should not
inherit him.
But Ld.

Chancellor
decreed a re-
demption. 2.
Chan. Cases
58, 59. S.C.

—Upon this
cause com-
ing before
Ld Keeper
North upon
a demurrer
to a bill of
review, he
inclined to
reverse the
decree; for
that *modus*
& *conventio*
vincunt le-
gem, and all
conditional
purchases or
bargains
must not be

7. A seized in fee in consideration of 1000l. paid to him by B. who married his kinswoman, conveys to B. and his heirs, and takes a re-demise for 99 years if he should live so long: and a covenant therein, that if he should pay 1000l. (with the interest that should be due for the same) at any time during his life that B. should re-convey to A. and his heirs; and that if A. did not pay the money then, that his heirs &c. should have no power to redeem. A. died, the money not being paid; and his heirs preferred a bill to redeem it. Tho' in this case it was prov'd, that A. had a kindness for B. as his near relation, and intended him the lands after his death, and that the clause of redemption was only put in because A. was a bachelor, and so might marry and have issue, but otherwise that B. should have the land absolutely, and that the 1000l. at the time of conveyance was the full value of the land, tho' by after accidents it became more valuable, but that had A. lived 30 or 40 years, the interest and interest upon interest thereby lost would be more than all, and there was no covenant or other remedy to compel payment of the money, yet Ld. Chancellor Nottingham held, that tho' A. had time to redeem during life, yet B. might have compell'd him to redeem or have foreclosed him; and said it was a general rule, that *once a mortgage and always a mortgage*; and in regard the estate was expressly redeemable in A's life-time it must continue so afterwards, and so decreed an account and redemption. Vern. 7. Trin. 33 Car. 2. Newcomb v. Bonham.

turned into mortgages; and that where there is a condition or covenant that is good or binding in law, equity will not take it away. Vern. 214. Hill. 1683. S. C. — And upon this cause coming on afterwards to be heard de integro before him, his lordship adher'd to his former opinion, that there ought to be no redemption, and principally, because it was proved to have been A's design to make a settlement by this mortgage, and intended a *benefit* and be-
nefit

benefit to B. the mortgagee in case he should not think fit to redeem this estate in his life-time; and there being an *express covenant that A. might redeem at any time during his life*, he thought he could not in equity have been debar'd of that privilege. For by a *bill to foreclose a man, you shall only bar him of his equitable title when the estate at law is become forfeited*; but where he has a continuing title at law, as in this case, by an express proviso that he might redeem at any time during life, he thought equity could not debar him of the privilege; and therefore since B. in this case could not have compelled A. to redeem, and he might have liv'd so long as to make it an *ill bargain*, and now that *by a contingency it happens to be a good bargain*, there is no reason to raise an equity thence to take the estate from B. the mortgagee, especially there being a kindness and benefit intended him by A. and therefore revers'd the Ld. Nottingham's decree, and dismiss'd the original bill for a redemption. Vern. 232. Pasch. 36 Car. 2. S. C.——His Lordship said, that *such covenant in a common mortgage should not be regarded*, but this was made with intention of a settlement besides the consideration of the money paid. 2 Vent. 364, 365. Pasch. 36 Car. 2. S. C.——And it is there said that this dismissal was afterwards affirmed in the House Lords in the 1 & 2 W. & M.——S. C. cited Wms's Rep. 269. arg. in case in Floyer v. Lavington.

8. A. mortgaged land to B. and the proviso for redemption was thus, viz. *provided that I myself or the heirs males of my body may redeem*, the question was, if his *assignee shall redeem it?* and decreed that he should; for if once a mortgage, always a mortgage. Vern. 33 Hill. 1681. Howard v. Harris. Afterwards upon a re-hearing before Ld. North it was insisted. r. That restric-

tions of redemption in mortgages have been always discountenanced in equity, and it would be a thing of mischievous consequence should they prevail. 2. That it was a maxim herethat an estate cannot be a mortgage at one time and at another time cease to be so by one and the same deed. 3. That it is another standing rule, that a mortgage cannot be a mortgage of one side only. And that in the principal case B. may make it a mortgage, for he has a covenant for re-payment of his mortgage-money, and for precedents, cited the case of Kilvington v Gardiner, who was to redeem at any time in his life-time, and Sir † Robert Jason's case. Ld. North decreed a redemption, and the rather for that the defendant had a covenant for re-payment of his mortgage monies——Vern. 191. Mich. 1683. S. C.——Ibid 215. same cases cited in case of Bonham v. Newcomb.——2 Chan. Cases 147. Mich. 35 Ca. 2. S. C. and there Mr. Keck cited the precedent of Killington v. Green, as in 1678, where it was decreed that the heir might redeem. Ibid. 148——S. C. of Howard v. Harris. cited Wms's Rep. 269. Mich. 1714. Arg. in case of Floyer v. Lavington.

* Ch. Cases 2. S. P. Trin. 12 Car. 2. but not decreed. Copleston v. Boxwill.——† 2 Chan. Cases 35. But per Ld. North, if A. borrows money of his brother and agrees to make him a mortgage, and that if he had no issue male his brother should have the land, such agreement proved might well be decreed. Vern. 193, 194. in case of Howard v. Harris. Mich. 1683.

9. A. mortgaged lands to B. the equity of redemption whereof was subject to the payment of divers debts; B. exhibited his bill against A. and all the creditors either to redeem or be foreclosed. A time of payment was appointed or else the defendants to stand foreclosed. J. S. one of the creditors paid the money and agreed with the others, that if they would pay him the money at such a day they should redeem him, otherwise he should hold absolutely. They did not pay at the time. After that J. S. had enjoyed the land 20 years and laid out 800l. in building, the creditors brought a bill to redeem him. Though it was insisted for the defendant on the length of time; and that this was no ways like the case of mortgagor and mortgagee; for that here the defendant had no way to compel the creditors to pay him his money, and that a mortgage ought to be mutual, that as one may compel the receiving so the other may the paying; and that it would have been thought odd for the defendant to have exhibited a bill to foreclose these creditors, yet Ld. Keeper decreed a redemption; because by the new agreement these lands became a mortgage in the hands of J. S. in respect of the other creditors,

creditors, by reason of the trust and confidence they had in him, and being all creditors alike; and principally because B. assigned his mortgage only to J. S. and not the benefit of the decree for foreclosure; and his Lordship directed an account, and J. S. to be allowed only necessary repairs and lasting improvements. Vern. 138. Hill. 1682, *Exton v. Greaves*.

10. The rule that where one side cannot redeem, the other shall not foreclose, does not hold in all cases. For if I lend 100*l.* upon a mortgage with a proviso to redeem on payment of 112*l.* at the end of two years, there one side cannot foreclose till the end of two years; but if the mortgagor at the end of the first year offers to pay the 112*l.* he shall be admitted to the redemption. Arg. Vern. 395. Pasch. 1686. in case of *Talbot v. Braddell*.

11. Lands were extended in 1 Car. 1. and held in extent, and a bill to redeem, and being not redeem'd the bill was dismissed 16 Car. 1. He that had the extent by virtue of the said dismissal sold the premises to the defendant, but the plaintiff having since bought the equity of redemption seeks a redemption. This Court, notwithstanding the dismissal and length of time, ordered an account from the time of the purchase, but the profits to go against the interest to that time. 2 Jac. 2. 2 Chan. Rep. 392. *Cloberry v. Lymonds*.

12. A. is bound with his father for the debts of the father; the father enters into a statute to pay the debts and indemnify the son. A creditor gives up his bond and takes a mortgage from the father. Decreed that the defendants should redeem or be foreclosed, and a perpetual injunction against the statute. Per Master of the Rolls. Hill. 1688. 2 Vern. 39. *Legriel v. Barker &c.*

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13. A. for 80*l.* conveys absolutely to B.—A. brings a bill to redeem; B. insists that the grant was absolute, but confessed it was a trust, that after the principal and interest paid, B. should stand seised for A's wife and children; plaintiff replies to the answer, but no proof of the trust, and therefore it was insisted that the husband should redeem; but 'twas decreed a trust for the wife and children. Pasch. 1693. 2 Vern. 288. *Hampton v. Spencer*.

14. A. grants a rent of 60*l.* per ann. for 300*l.* for seven years payable half yearly and secured by demise and redemise. Master of Rolls decreed a redemption on payment of what was arrear of the annual payment without interest or costs. On appeal the court took time to consider of it. Pasch. 1693. 2 Vern. 288. *Fawcett v. Bowers*.

15. A. mortgaged land to B. and by another deed covenants to convey ground rents issuing out of the mortgaged estate to the value of the mortgage money at 20 years purchase if B. should think fit. Master of Rolls decreed a redemption and the covenant to be set aside as unconscionable. A man shall not have interest for his money and a collateral advantage besides for the loan of it, or clog the redemption with any agreement. Mich. 1705. 2 Vern. 520. *Jennings v. Ward*.

(R. 2) Redemption. *Of what.*

1. **A** *AN* adventure in the *E. India Company* was mortgaged and continued so 14 years. Decreed to be redeem'd, notwithstanding the hazard and contingency to which it was liable was objected. 27 Car. 2. 2 Ch. R. 108. *Newton v. Langham*.

2. If termor of a renewable term mortgages the same, and the mortgagee gets a grant of an additional term, it was held by the Master of the Rolls, that this is subject to the same equity of redemption; and decreed accordingly. Hill. 1728. And afterwards affirmed on appeal to Ld Chancellor. (12 July 1729) 2 Wms's Rep. 511. *Rakestraw v. Brewer*.

Such renewed term has always been ruled to be redeemable with the principal term, as an excrescence

out of it, and to go with it. Per Lord Chancellor. Select cases in Chan. in Ld. King's Time. 56. Trin. 11 Geo. 2. S. C.

3. And this Court has gone so far, that if a trustee or mortgagee has got a new term after the actual expiration of the old one, yet it shall be a trust; for it is supposed to have proceeded from the having had the original term; and though there be nothing in fact in having a *tenant-right*, yet as such regard is had to it in the estimation of the world, it will be looked upon as the occasion of the lease. Arg. said, that it had been so ruled in this court. Select cases in Chancery in Ld. King's time. 56. in case of *Rakestraw v. Brewer*.

4. And where a difference was taken between such former general rules; and where such renewed term is granted as a favour to one of their own society being the mortgagee, as in the principal case it was of chambers in Gray's Inn mortgaged to one of the Benchers, and an additional term was granted to him by the Society, and which was said to be done on the foot of his being a bencher, and not as a mortgagee, yet the same was not allowed by the Ld. Chancellor. Ibid. 56. S. C.

(S) Redemption. *After Foreclosure. In what Cases, by other Mortgagees.*

1. **A** mortgages *Black acre* to B. and *White acre* to C. who after forfeiture assign to D. who brought a bill, and had a decree to foreclose, which being signed and enrolled, he sold the same to E.—A. had confessed a judgment to J. S. of 1600*l.* to indemnify against a bond, in which J. S. was bound with A. as A's surety; and afterwards, but before the foreclosure by D. A. mortgaged *black acre and green acre* to F. and confessed a judgment, and also gave a statute for better security. The judgment to J. S. was satisfied, but was kept on foot on pretence of a deed directing it to remain

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as a security to indemnify J. S. from other engagements for A. But what other engagements were, were subsequent to the mortgage to F. And after F's mortgage, A. declared that the judgment to J. S. should stand a security to indemnify W. R. as well as J. S. and J. S. assigned his judgment to W. R. who extended black acre, and had a decree to redeem D. Afterwards W. R. assigned the judgment and extent to E. On a bill by F. it was insisted, that the assignment of D's mortgage, and of the judgment of J. S. ought to be considered separately; and that tho' D's mortgage being prior in time to that of F. and so E. has an equity to be paid what is due thereon, yet tho' A. was foreclosed, F. ought to be let in to redeem the same; but as to the judgment to W. R. it is otherwise; and decreed accordingly. But the principal and interest, from the former decree of foreclosure, to be taken as a principal sum, and interest to be computed from that time for the same. Fin. R. 406. Hill. 31 Car. 2. Shermer v. Robins.

See (F)—
(R)—(U)

(T) Redemption. On what Terms.

1. *M*ortgagee purchased the land mortgaged. The plaintiff, who had title of redemption, shall declare, whether he will redeem or not, before the validity of the mortgage shall be tried at law; and if he will redeem, he must pay principal money, damages, and costs. Chan. Rep. 169. 1655. Smith v. Valence.

2 Vent. 343.
S. P.—

Not, if he
had notice.

Fin. R. 197.
Hill. 27 Car.

2. Jacob v. Thacker.

2. Where mortgagee lends more money on his old security, and a settlement for jointure intervenes; if he has no notice he shall be allowed it against the jointress. Chan. Cases 119. Hill. 20 & 21 Car. 2. Coddard v. Complin.

S. P. Fin.

51. Hill. 25

Car. 2. Mole

v. Franklin.

—2 Vern.

207. S. P.

Hill. 1690.

Mergrave v.

Le-hook.—

Ibid. 286.

Hill. 1692.

S. P. Pope v.

Onslow.—

2 Chan. Cases 23.

Hill. 31 &

32 Car. 2.

Bromley v.

Hammond.—

If I have

several mortgages

upon several lands for

red.

each from the said

person, and one of

the mortgages proves

a bad title, and

other good, the

2. Where a bill is brought to redeem two mortgages, and there is more money lent on one than the estate is worth, the plaintiff shall not elect to redeem one, and leave the heavier mortgage unredeemed, but shall be compelled to take both or neither. Per Mr. Hutchins. Vern. 29. Hill. 1681. in Case of Purefoy v. Purefoy.

—If I have several mortgages upon several lands for red. each from the said person, and one of the mortgages proves a bad title, and other good, the mortgagor shall redeem the good one without paying the money upon the bad one. 12 Mod. 559. Mich. 13 W. 3. in Chancery, said at the bar in Case of Monger v. Kerr.

4. A. has an annuity charged on the manor of S.—B. has estate within the manor liable to the annuity. C. has an after-mortgage. B. having no notice of the mortgage, buys in A's annuity, and for that and money by A. lent to re-

ver-

reversioner in Fee, B. pays to A. a sum of money amounting in all to 900l. of which the money due to A. was 500l. and the money lent to the reversioner 400l. Decreed that B. not having notice of C's mortgage, if C. will redeem he must pay B. not only the 500l. due to A. but likewise *the 400l. lent to the reversioner in fee.* Secus if B. had had notice. 2 Chan. Cases 20. Hill. 31 & 32 Car. 2. Blackstone v. Moreland.

5. A. was *tenant for life, remainder to B.* (his son) in tail, by marriage settlement on great consideration. A. made oath that he was seised in fee, and mortgaged in fee for 100l. and dies. B. borrows 100l. of the same mortgagee, and mortgages the same estate. Decreed, that B (who in this case is as a stranger to his father) shall redeem on payment of the *money borrowed by himself*, and damages and costs. 2. Chan. [466] Cases 23. Hill. 31 & 32 Car. 2. Bromly v. Hammond.

6. *Baron and Feme* by deed and fine mortgage the *wife's land* for 400l. the baron pays in part of the principal, and after borrows the same sum again of the mortgagee. The heir of the wife shall not redeem without paying of both sums. Vern. 41. Pasch. 1682. Reason v. Sacheverell. 2 Chan. Cases 98. S. C.

7. He that comes to redeem a mortgage must *shew a title* to the equity of redemption. Vern. 182. Trin. 1683. Lomax v. Bird.

8. In case of a deed of *entail* set forth, the *heir general* shall not redeem without shewing that the tail was docked. Per Ld. North. Vern. 182. Trin. 1683. Lomax v. Bird. Vern. R. 342. Mich. 1685. Hall v. Dunch. 357. cited Hill. 1685.

9. The *heir* buys in an incumbrance on an estate charged with Portions, he shall be *allowed* no more than what he really paid. Vern. 335. Mich. 1685. Braithwait v. Braithwait. *But if a Stranger gets an assignment of a mortgage for less than due, mortgagor or his heirs shall not redeem without paying the whole that is due.* Vern. 336. Mich. 1686. Philips v. Vaughan.—S. P. Defendant demurr'd. 3 Chan. Rep. 23. S. P. 19 Car. 2. Baker v. Kellet.

10. *Lands were vested for a particular purpose* in trustees by an act of parliament. The heir, on paying so much as had been applied to that purpose according to the trust with interest and costs, discounting the profits received by the mortgagees, shall be let in to redeem. Per Jeffries C. 2 Vern. 5. Trin. 1686. Cotterel & Holt v. Hampson, Bill, & al.

12. A. mortgaged *first to B. and then to C.* and then B. *lent to A. more money on a statute.* C. brought a bill, and charged notice, but B. *denied notice evasively only*; but because he did not deny it positively, Lord Wright and Master of the Rolls decreed a redemption on payment of *the first money only.* Ch. Prec. 226. Tr. 1703. Cason v. Round.

13. Mortgage of lands by A. to B. for 16000l. And in another deed at the same time was a covenant that A. would convey

~~not~~ so much of the estate at 20 years purchase, as should be of the value of the money lent. But Master of the Rolls decreed a redemption on payment of principal, interest and costs, and set aside the agreement as unreasonable; and said a man shall not have interest for his money, and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement. 2 Vern. 520. Mich. 1705. Jennings v. Ward & al.

Abr. Equ. cases 325. S. C.—
The difference is between debts contracted after or before the mortgage;

14. Mortgagee * cannot tack bond and mortgage together against the mortgagor himself; but against the † heir he may, or against a devisee; for the heir is chargeable with the bond even at law. And the devisee, since the statute against fraudulent devises, is in the same case with the heir. Ch. Prec. 407. Trin. 1715. Challis v. Calborn.

for the mortgage; for if they had been before they would have been intended to be included in the mortgage; per Ld. Rawlinson. Ch. Prec. 18. Hill. 1690. Eccles v. Thawhill.

* G. Equ. R. 96. S. C. reported contra, that he may tack them together.—If a mortgagee lends more money to the mortgagor on bond, the mortgagor shall not redeem without paying the bond debts as well as the mortgage. Vern. 244. Trin. 1684. Baxter v. Manning.—S. P. Vern. 174. Trin. 1683. per Ld. North, in case of Creed v. Covill.—So where money was lent on bond before the mortgage, which was agreed to be secured by the mortgage, but was not. 2 Ch. R. 247. 34 Car. 2. Windham v. Jennings.

† The heir shall not redeem without payment of both, in case the heir is bound. Vern. 245. Shuttleworth v. Laywick.—2 Chan. Cases 164. S. P. Tr. 36 Car. 2. Anon.—The same in case of a mortgage made to a surety, who stands engaged for more money afterwards. Chan. Cases 97. Hill. 19 & 20 Car. 2. St. John v. Holford.—Fin. R. 51. Hill. 25 Car. 2. Mole v. Franklin.

And a bond creditor of the heir himself shall be preferred to a bond creditor of his ancestor after alienation made, whether it were voluntary or for a valuable consideration. Ch. Prec. 512. Hill. 1718. in case of Coleman v. Wince.

But if a mortgagee in fee lends more money to mortgagor upon the bond, the vendor of the heir of the mortgagor shall redeem without payment of the bond debt; per Ld. Somers. Chan. Prec. 89. Hill. 1698. Baily v. Robson.—S. P. decreed accordingly per Ld. Macclesfield. Ch. Prec. 511. Hill. 1718. Coleman v. Wince.

[467] But the executor of mortgagor shall not redeem without paying both debts, though there be no special agreement that the bond debt should stand secured by the mortgage. 2 Vern. 177. Mich. 1690. Anon.—But if the executor alienates the equity of redemption, his alienee shall redeem on payment of the original debt only: per Ld. Macclesfield. Ch. Prec. 512. Hill. 1718. in case of Coleman v. Wince.—S. C. & P. Wms's Rep. 776. 77. Hill. 1721.

Mortgagor may redeem on payment of what is due on the mortgage without payment of a debt due by simple contract. Fin. R. 379. Tr. 30 Car. 2. Newby v. Cooper.—But where mortgagor borrows more money of mortgagee on notes, or becomes indebted to him by simple contract per Cowper C. After the day of payment lapsed, he must pay the notes and the simple contract debt, but not subsequent bond debts. Ch. Prec. 421. Mich. 1715. in case of Demandary v. Metcalf.—G. Equ. R. 105. S. C. Trin. 1 Geo. 1.

But if testator being possessed of a term mortgages it to A. and becomes also indebted by simple contract, and dies, his executor bringing a bill to redeem shall pay both the mortgage and simple contract; because the very equity of redemption is affected to pay simple contract debts. But if any creditor of testator brings a bill to redeem this mortgage, he shall only pay the mortgage. Wms's Rep. 777. Hill. 1721. in case of Coleman v. Wince.

If A. mortgage land to B. for 100l. and A. owes B. also 100l. by contract or bond. A. shall be admitted to redeem the mortgage without paying the 100l. by the contract or bond, and B. is left to his remedy on his contract or bond. 12 Mod. 559. Mich. 13 W. 3. in case of Monger v. Kett.

15. It is a rule in equity, that mortgagee in possession, who is sued for a redemption, shall never be stripped of his possession before payment. MS. Tab. cites 7 Feb. 1717. Brine v. Hartpoole.

16. Where possession is got against a mortgagee by fraud pending a suit, it must be restored before there can be any redemption.

demption. MS. Tab. tit. mortgage, cites 18 Jan. 1719. *Lant v. Crisp.*

17. In the mortgage was a *covenant that if the estate was to be sold the mortgagee should have the preemption.* But he getting the counterpart into his hands after the mortgagor's death, and pretending an uneasiness at not being paid his money, and threatening a foreclosure, and not claiming the preemption till after the estate was sold in order to raise the money to pay him, he was decreed to reconvey on payment of principal, interest &c. 9 Mod. 2. Pasch. 8. Geo. Orby v. Trigg.

18. A bill was brought by J. S. (who stood in the place of the mortgagor, he being a bankrupt) to redeem a mortgage assignment of a term made by A. the bankrupt to B.—B. the mortgagee insisted that he was not a mortgagee, but an absolute purchaser of the term; whereupon it was urged, that B. had not only forfeited his own, but should likewise pay the plaintiff's costs of this suit by such his insisting on the mortgage being an absolute purchase. But Parker J. who sat for the Ld. Chancellor said, he thought that would be going too far to make B. pay costs, but his opinion was, that B. had forfeited his own costs; for in the first place, there was an indorsement under B's own hand admitting the assignment to be a mortgage; and in the next place, there was a witness who falsified his answer. Barn. Chan. Rep. 30. 33. *Franklyn v. Fern.*

(U) Redemption. *At what Time.*

See (R).

1. *Antiquity* is a just cause to deny redemption. Chan. cases 220. Hill. 23 & 24 Car. 2. *Roscarrick v. Barton.*

2. The heir of a mortgagee is not to be relieved *after several dismissions and decrees*, unless he can prove *an extraordinary value* of the land. Toth. 169. cites 7 Car. *Mitchell v. Chamberlain.*

3. A mortgage not being relieved after 20 years forfeiture, and the estate descending to an heir, who sells the same, was all pleaded, and held good. Chan. Rep. 206. 13 Car. 2. *Clapham v. Bowyer.*

The rule for redemption within 20 years should be inviolably abided by as it is

for the quiet of men's estates; and neglecting for so long a space of time to pursue their rights, is a *dereliction of the pledge*, and should not be broke into. For it is a natural reason to think, that persons having a right would pursue it in such a space of time, if it was worth while; and by its not being done, as it was their interest to do so (about which men are very sedulous) the natural deduction is, that they thought it not worth while. But a case may be out of the general rule; as where the supposal of a dereliction may be answered, as where the right of redemption is *industriously obscur'd by particular clauses*, (viz. that the redemption must be with his own money, and in his own life time &c.) which would be useless for any other purposes, but to create an imagination that he could not do it unless with his own money, and in his life; per Ld. Commissioner Gilbert, *Select cases in Chancery in Ld. King's time.* 11 Pasch. 11 Geo. 1. 1725. *Ord v. Smith.* [468]

* 2 Chan.
cases 58. S.
C. — But
this decree
was reversed

4. A mortgage is made *redeemable during the life of mortgagor only*, yet his heirs shall redeem; per Ld. Nottingham C. Vern. 7. Tr. 33 Car. 2. * Newcomb v. Bonham.

by Ld. North on the special circumstances. 2 Vern. 232. Pasch. 36 Car. 2. — 2 Chan. Cases 148. the case of Killington v. Green, cited by Mr. Keck as decreed so in 1678. — The Reversal affirmed in Parliament. 1 & 2 W. & M. 2 Vent. 365. — See (R) pl. 8.

If a man borrowed money of his brother, and agreed to mortgage land, and that if he had an issue male, the mortgagee should have the land; Ld. North held, that such an agreement made out by proof might well be decreed in equity. Vern. 193. 194. Mich. 1683. in case of Howard v. Harris.

Tr. 21 Car.
2. Hard. 512.
Woollaston
v. Aston.

5. Fine levied by mortgage, and five years non-claim will not bar the mortgagor of his equity of redemption. Vern. 132. Hill. 1682. Weldon v. Duke of York.

If I lend
100l. upon a
mortgage
with a pro-
viso to re-
deem on

6. A. in 1657 conveyed to B. *redeemable* on payment of 1000l. in 1688. and possession is immediately delivered. Redemption was decreed before the day of payment in the proviso. Vern. 394. Pasch. 1686. Talbot v. Braddil.

payment of 112l. at two years end, though one side cannot foreclose till the end of two years, yet if the mortgagor comes at the end of one year, and offers to pay the 112l. he shall be admitted to the redemption. Arg. Vern. 395. Pasch. 1686. in the case of Talbot v. Braddil. — Vern. 183. S. C.

7. A. mortgaged in 1639. In 1663. his heir brings a bill to redeem; he dying, the suit is revived by his coheirs in 1672. but no prosecution. B. having purchased the equity of redemption of them, brings a bill now (in 1700) to have the benefit of the former decrees. Ld. Wright dismissed the bill because of the difficulty of the account, and the length of time; and though *infancy* may answer the objection in not coming to redeem, yet where *the time begins upon the ancestor*, it shall run on against his infant heir, as in case of a fine at common law. 2 Vern. 418. Hill. 1700. St. John v. Turner.

8. A note was given at the time of the release of an equity of redemption, that the releasor should have the lands reconveyed to him upon payment of what was given for the land, within a year; such payment having been neglected for several years, there shall be no redemption. MS. Tab. cites 10 Feb. 1706. Endsworth v. Griffith.

9. No redemption after 40 years possession but on a stated account for turning interest into principal. MS. Tab. cites 15 January, 1710. Conway v. Shrimpton.

* Sir Joseph
Jekyl cited
the case of
Lord Wid-
drington v.
Jennings in
Ld. Har-
court's time,
where the
Court took
such a dif-

10. A. for 800l. paid by B. granted a rent-charge of 48l. per ann. upon condition that if A. should at any time give notice to pay in the 800l. by installments (viz.) 100l. at the end of every 6 months, and should pursuant to such notice pay the said money and interest at any time during A's life, then the grant to be void; there was no covenant by A. to pay the money and the interest of money at that time being 8l. per cent. did much exceed the rent-charge, and it was 60 years since the grant was made. It was insisted that a mortgage * of rent is *redeem-*

redeemable at a longer distance of time than a mortgage of lands, the incomes and outgoings of the former being certain, but that of the latter uncertain, and consequently the account for it the more difficult; that a mortgage if never so old is redeemable if interest has been paid, and that in this case the payment of the rent was the payment of interest; but *Ld. C. Cowper* conceived that taking it altogether, the rent-charge was not redeemable, and decreed the bill to be dismissed with the usual costs, it being only upon bill and answer; but the Reporter says, it was thought that the length of time was the chief objection to the redemption. *Wms's Rep.* 268. to 273. Mich. 1714. *Floyer v. Lavington*.

ference be-
twixt a
mortgage of
a rent-
charge and
of land; and
that a re-
demption
was allowed
after a very
long time,
he thought
80 years.

[469]

11. A mortgage was redeemable on Michaelmas 1702. or at any other Michaelmas day following; this mortgage may be redeemed 1000 years hence, and that without the assistance of a court of equity, there being no covenant for payment of the money; per *Lord Cowper*. Ch. Prec. 423. Mich. 1715. *Howell v. Price*.

12. Where by special agreement profits are to be set against interest, whether length of time be a bar to foreclose? MS. Tab. cites 17 February 1717. *Brine v. Hartpole*.

If the mort-
gagor agrees
that mort-
gagee shall
enter and
this case it

Hold tell he is satisfy'd, length of time is no objection to a redemption; and in this case it was 60 years. Vern. 418. Mich. 1686. *Orde v. Heming*.

13. Equity will not enlarge the time for mortgagor to redeem after 6 years acquiescence under a foreclosure by his own consent, especially if there have been any improvements on the estate. MS. Tab. tit. mortgage cites 18 January, 1719. *Lant v. Crisp*.

14. There shall be no redemption after long possession, settlements made, and estate improved. MS. Tab. cites 8 April 1720. *Courtney v. Langford*.

15. A. in 1679 mortgaged lands to J. S. for a small sum of money by an absolute conveyance and defeasance, but the redemption was expressed to be made with A's own money, and in his life time. Soon after A's necessities forced him to go abroad, where he died about 27 years since, and his heirs knew nothing of the mortgage. In 1702 J. S. devised that if the mortgage should be redeemed, the money should go so and so. About 16 years after the will a bill was filed for redemption, to which was objected the great length of time, and that by the settled rules of the Court, a mortgage shall not be redeemed after 20 years. The Master of the Rolls held, that decreeing a redemption would be no wrong or hardship to the party; for he will have greater interest than the law now allows, and that the not decreeing a redemption would be establishing a very great imposition, and tho' absolute conveyances and defeasances were formerly much used in mortgages, yet the same

is left off as dangerous by losing the defeasance, which is avoided by being in the same deed; that the words in the defeasance however fettered signify nothing, where the money is to be repaid; for the borrower being necessitated, and so under the lender's power, the law makes a benign construction in his favour; but this was a *fraud in its creation*, and in such case is *redeemable after any length of time*; for the words (to be paid with his own money) were thrown in to no other purpose but to make A. imagine it could not be done otherwise; whereas any other person's money was of equal value. But if singly considered distinct from the fraud, there is sufficient for redemption by the declaration in the *will*, where he *calls it a mortgage*; and as A. by those fettering clauses, would have a right to redeem, so will his heir too, who would be equally deceived by them; but here it appears that the heir knew nothing of this deed, which is still stronger, and had he known of it, it would have deceived him and led him into an imagination that he could not redeem; and Lord Commissioner Gilbert was of the same opinion, and thought this case out of the general rule of *dereliction*, which ever *supposes previous knowledge of the right*, it being absurd to say a man relinquishes a right which he knows nothing of, nor can it be supposed a dereliction, or a right neglected, or disregarded, by reason of the great over value; and a redemption was decreed. *Select Cases in Chan. in Lord King's Time 9. Pasch. 1725. Ord v. Smith.*

[470] 16. The Master of the Rolls said, he remembered a case about 20 years ago where a redemption was decreed on a mortgage made in 1642, and where there was *neither infancy nor ouster le mere*, but only the *mortgagee having brought a bill to foreclose*, it was an admission, that he considered it as a mortgage, and so the mortgagor was let in to redeem. *Select Cases in Chan. Lord King's Time 10.*

17. A. mortgaged his *chambers in Grey's Inn* to B. in 1687, but continued possession till 1700, at which time an order of the bench was made to deliver possession to B.—B. entered into part, but A. continued possession of the rest till 1708.—A. died leaving the plaintiff an infant, and B. then being in possession of the whole. The infant came of age in 1714.—In 1721 B being a bench got 11 years added to his term by the society.—In 1726 plaintiff brought his bill to redeem. And a decree was made at the Rolls to redeem, and also to have the renewed term conveyed on payment of the consideration money with interest for the time. In arguing this case before Ld. Chancellor it was admitted, that where a mortgagee is in possession for 20 years and no interest paid, the *mortgagor shall not redeem*; but where he is in possession of any part, the computation of that time shall never affect him, but only from the time the mortgagee was in possession of the whole, and shall

shall be admitted to redeem; and Ld. Chancellor was of the same opinion, and affirmed the decree, and added, that for part the mortgagor may redeem, as being in possession, and as he cannot do that separately, he shall redeem the whole. That in this case A. was in possession till 1708, and that from 1708 to 1714, the plaintiff was an infant, and so that time is accounted for, and that from 1714 to this time (viz. 1726) it does not amount to 20 years. *Select Cases in Chan. in Ld. King's Time* 55, Trin. 11 Geo. 1. *Rakestraw v. Brewer*.

18. A decree of foreclosure is not to be set aside after 20 years for matter of form only; upon a demurrer to a bill of review. MS. Tab. cites 12 February 1727. *Jones v. Kendrick*.

19. A. seised in right of M. his wife mortgaged the estate in 1692 for 785l. to J. S. and covenanted on or before Easter term then next to levy a fine for securing J. S.'s title; but the fine was not levied till Trin. term.—J. S. assigned to T. for a valuable consideration. In August 1695. A. and M. by deed, in consideration of about 10l. released to T. the equity of redemption, the estate being then but 40l. a year, and therein covenanted that the fine levied as aforesaid should be for corroborating this deed. T. entred and expended large sums of money, so that it was improved from 40l. to 56l. a year.—In 1718 A. died.—And in 1727 M. died.—In 1735 M's heir conveyed all his interest to F. for 81l. Ld. C. Hardwicke said, he thought there was no ground for relief; that the purchase was after so great length of time from making the mortgage, and then from one who never had been in possession, and whose ancestors had not for a great number of years; that he inclined to think in point of law, that the fine, not being levied by the time covenanted, could not operate to strengthen the mortgage deed, but that to strengthen the deed of 1695 it well might, and that the subsequent deed might well declare the uses of that fine; and if so the defendant was a purchaser of the inheritance; but said he would not determine the present question merely on this point of law, but upon the whole circumstances of the case. Suppose the defendant was only the representative of a mortgagee, there were strong objections against the plaintiff's being allowed to redeem him after so great a length of time; besides his lordship thought the 81l. consideration money was not sufficiently proved to have been paid, and dismissed the bill with costs. *Barn. Chan. Rep.* 187. Mich. 1740. *Fleetwood v. Templeman*.

20. On a decree of foreclosure 6 months time was allowed for redeeming as usual; towards the expiration of the 6 months the mortgagor got an order for 6 months more; and afterwards got another for 6 months more, but part of the order was that he sign the register's book not to ask any further enlargement; but though he had signed the book according to the order, yet he moved for 6 months more, and chiefly upon this circumstance, that

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that the estate was of greater value than the incumbrance upon it amounted to; and Ld. C. Hardwicke upon that circumstance thought it reasonable, but made it part of his order, that this last time should be peremptory. Barn. Chan. Rep. 221. Mich. 1740. Anon.

21. A decree of foreclosure having been made, and the 6 months time for redeeming being expired according to the computation of lunar months, it was moved, that defendant stand absolutely foreclosed; but Ld. C. Hardwicke was of opinion, that the computation in this case ought to be according to the kalendar, and not according to lunar months, and accordingly granted further time for payment. Barn. Chan. Rep. 324. Hill. 1740. Anon.

(U 2) Redemption. *How.* In Cases of Ejectment &c. By 7 Geo. 2. cap. 20.

1. 7 Geo. 2. **E**NACTS that, in all actions at law relating cap. 20. S. 1. to mortgages, or monies secured by mortgage, whether on collateral bonds, or in ejectment, if there is no suit in equity to foreclose, the tender of principal interest and costs by the person having right to redeem pending such action, and upon refusal to accept, the bringing the same into Court shall be deemed a satisfaction, and the Court may compel the mortgagee at the mortgagor's costs to assign &c. the premises as mortgagor &c. shall direct.

S. 2. Where bills are filed to compel payment of the monies due on such mortgage, together with money due on any incumbrance, or specialty charged or chargeable on the equity of redemption thereof, and for not payment to foreclose, the Court on defendant's request (having right to redeem and admitting the plaintiff's right) may proceed to a decree at any time before a regular hearing, and all parties shall be bound thereby as if the cause had been regularly heard.

S. 3. Provided not to extend to cases where the party against whom a redemption is prayed, shall by writing (to be delivered to the plaintiff's attorney &c. before the bringing in the money into such Court at law) insist either that the party praying it has no right to redeem, or that the premises are chargeable with other principal sums than appear on the mortgage, or shall be admitted on the other side, nor to cases where the right of redemption to the premises is controverted by, or between, different defendants in the same cause or suit, nor shall be any prejudice to any subsequent mortgagee &c. or incumbrancer.

(U. 3) Equity of Redemption. *Disposable how &c.*

N. Ch. R.
101. S. C.

1. **T**HOUGH a precedent voluntary conveyance is fraudulent as to a mortgage subsequent & pro tanto, yet it will pass the equity of redemption. Chan. Cases 59. Mich. 16 Car. 2. Rand v. Cartwright.

2. An.

2. An equity of redemption is *not intailable* within the statute De Donis &c. Arg. Chan. Cases 219. Hill. 23 & 24 Car. 2. in the case of Rolcarrick v. Barton.

3. Equity of redemption is *deviseable* after forfeiture; but whether as land, so that there must be three witnesses to the will, non constat, though it was the point in dispute. 2 Chan. Cases 8. Mich. 31 Car. 2. Anon.

4. Equity of redemption is within the provision of 11 H. 7. 20 per Wright K. 2 Vern. 489. Hill. 1704. In the case of Clifton v. Jackson.

(W) Account. In what Cases Mortgagee shall [472]
Account for the Profits.

1. Mortgagee after forfeiture *assigns* without the mortgagor's joining therein, and is decreed to account for the whole time, (without the assignee's being party) and to convey free from incumbrances done by him or his assignee &c. Chan. Cases 3. Trin. 12 Car. 2. Venables v. Foyle.

13 Car. 2.
N. Ch. R.
60 S. C.

2. A. mortgagee of *an estate for life* shall account for no more than the estate had been worth to have been sold at first, the mortgage being more than 20 years old; decreed in Chancery by Ld. Keeper with the assistance of Vaughan and Hales. But on appeal to Parliament ordered otherwise. Chan. Cases 109. Trin. 20 Car. 2. Morley v. Elwes.

3. *Wife of mortgagee recovered dower*, and it was paid, the Sheriff having set it out; this shall not go towards the discharge of the mortgage, though the heir of the mortgagor did not prevent her dower; and it was said that the heir of the mortgagor might recover it of the doweress; but quære whether the statute bars it or not? but note in this case she was a party to the bill, but not brought to hearing. 1673. 3 Ch. R. 82. Smith v. Hanbury.

N. Ch. R.
70 S. C. says
it was ruled
that it
should not
go towards
satisfaction
of the mort-
gage. 24
Car. 2.

4. Baron makes a jointure of an equity of redemption and becomes bankrupt, the *assignees of commissioners of bankruptcy state accounts with mortgagee*. If the *jointress* will be relieved against the account, she must in her bill assign particular errors. Per Ld. North. Trin. 1683. Vern. 179. Knight v. Bampfield & al.

5. A. in 1657. conveys to B. subject to redemption *on payment of 380l.* in 1688. and possession is immediately delivered. At the time of conveyance the estate was but 15l. per Ann. but by the decease of two old lives became 45l. and a rent was reserved of 5s. per Ann. on the conveyance, which was constantly paid by B. Ld. North decreed a redemption before the day of payment in the proviso, and an account of the profits. Trin. 1683. Vern. 183. Talbot v. Braddil.

Jefferies C.
inclined that
the plaintiff
should re-
deem, but
proposed
that whereas
the master
had reported
B. to be 60l.
over-paid

and B. had since that received two years profits, the plaintiff should waive the benefit of the account,

account, and B. forthwith deliver possession and gave B. a week to consider it. Pasch. 1686. Vern. 395. Talbot v. Braddil.

So where mortgagor becomes a bankrupt and mortgagee refuses to enter, and

6. When mortgagee had *recovered in ejectment*, and in combination with the tenant in possession *refused to enter*, he shall answer for the profits, unless he takes out execution before the end of the term. Per Ld. North. Mich. 1684. Vern. 258. Duke of Bucks v. Gayer.

permits the bankrupt to continue in possession and to fence against the assignees with this mortgage; on an ejectment brought by them, mortgagee shall stand charged with the profits from the time of the ejectment. Mich. 1684. Vern. 267. Chapman v. Tanner.—— So where he enters, and so prevents the entry of subsequent incumbrancers, and yet permits mortgagor to take the profits, he shall be charged for all the profits he might have received after his entry. Mich. 1684. Per Ld. North. Vern. 270. Coppring v. Cooke. — And Cooke v. Knight & al.—— Mich. 1691. Ch. Prec. 30. Bingham v. Haincourt.—— But in the common case of a mortgagee's suffering mortgagor to continue possession and receive the rents, he may at any time after foreclose, and the rents received by the mortgagor shall not go in part of satisfaction, though other incumbrances are behind it. Pasch. 1722. Per Ld. Macclesfield. Ch. Prec. 587.

7. Lands were extended in 1 Car. 1. and held in extent, and a bill to redeem, and being not redeemed the bill was dismissed 16 Car. 1. He that had the extent by virtue of the said dismissal sold the premises to the defendant, but the plaintiff having since bought the equity of redemption seeks a redemption; this court, notwithstanding the dismissal and length of time, ordered an *account from the time of purchase*, but the profits to go against the interest to that time. 2 Jac. 2. 2 Ch. R. 392. Cloberry v. Lymonds.

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In case of
Welsh mort-
gages, the
Master of
the Rolls
thought if
the value was
excessive the
Court would

8. A. conveys land to B. who is put into possession; the *deed was absolute*, but there was an agreement that *if A. pays the money in 10 years B. shall re-convey*; the profits appearing to be much more than the interest, upon a bill by the heir to redeem it, it was decreed that B. account for the profits, and not be permitted to set the profits against the interest. Mich. 1687. Vern. 476. Fulthorp v. Foster.

decree an account, notwithstanding the agreement to retain the profits in lieu of the interest. Vern. 477. in case of Fulthorp v. Foster.

9. A. borrows 200*l.* of B. and surrenders a copyhold of inheritance to be void on payment of 200*l.* and interest in April following; A. gives bond to B. at the same time that *if the 200*l.* and interest should not be paid at the day, then if B. should pay to A. 78*l.* more within 10 days after in full for the purchase of the premises*, the bond should be void, &c. A. died before the mortgage was forfeited. The 200*l.* was not paid at the day. B. pays the 78*l.* the day after to A's administrator. This was no absolute purchase, and ordered the whole 278*l.* to be repaid with costs, discounting the mesne profits. Mich. 1687. Vern. 488. Willet v. Winnel.

10. Though mortgagor is foreclosed by decree signed and inrolled, and an account is taken in the suit where such decree was obtained, it will not bind the *subsequent incumbrancers* that

that come to redeem the mortgagee. Trin. 1710. 2 Vern. 663. Morret & al. v. Western.

11. *A. and B. his son in 1654 mortgaged a house in O. by way of feoffment for 200l. to J. S.——A. died leaving B. his heir. B. died leaving C. a feme his heir. C. intermarried with J. N.——In 1684. J. N. took an assignment of the mortgage in the name of H. N. in trust for himself, and laid out great sums of money in improvements.——In 1703. J. N. mortgaged the premises to E. his sister, in consideration of 400l. by her paid, for 500 years to secure 30l. a year annuity to her for her life, and after her decease to secure 400l. to such children or grand-children of J. N. as E. by will or otherwise should appoint.——In 1707. J. N. having two daughters, the youngest whereof had D. a son, by will devised to his grandson D. and his heirs all his freehold messuages and garden grounds in O.——J. N. had no other lands in O. but the house abovementioned. J. N. died and C. survived, and after C. died. The eldest daughter and her husband brought a bill against H. N. and D. and the other daughter (her sister) and her husband and their son an infant for a redemption of a moiety of the premises, insisting that J. N. had only a redeemable interest, and no power to give the inheritance. Upon hearing the cause 11 May, 1715. the Court declared that the plaintiffs had a right to redeem a moiety, and that J. N.'s first entry ought to be looked upon as in right of his wife who had the equity of redemption, and that he so continued in possession till he took the assignment of J. S.'s mortgage in the name of H. N. in trust for himself, and therefore during that time the rents and profits were no otherwise to be accounted for than to keep down the interest of that mortgage, but that nothing was to be allowed for repairs, or lasting improvements during that time; and it was referred to a master to take an account of what money was laid out in repairs and lasting improvements after the assignment of that mortgage, and that J. N. should bear one 3d. as he had the benefit of the estate for life, but for the other two 3ds. he was to compute interest at the rate of 6l. per cent. from the time of the money so laid out; and from J. N.'s death to compute interest for the principal money due on that mortgage, and take an account of the whole profits of the premises, and if it appear that the money laid out upon improvements together with the interest of the money were unpaid, and that the mortgage-money and interest were likewise unpaid, then D. and his father should refund a moiety of the overplus to the plaintiffs, and that a moiety of the premises be assigned to the plaintiffs. On rehearing, the Court directed that it should be added to the former order, that if D. was overpaid a moiety of what was due for principal or interest on the mortgage he should refund the overplus, and that the allowance for repairs be struck out of the order, and the rest of the decree be confirmed. Barn. Chan. Rep. 457. cites 11 May 1711. Clarke v. Abbot,*

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(X) Allowances to Mortgagee.

1. **I**N some cases the Court of Chancery will relieve where the mortgagee will suddenly bestow unnecessary costs upon the mortgaged lands on purpose to clog the lands to prevent the mortgagor's redemption. Toth. 231. cites 15 Car. Bacon v. Bacon.

2. *Voluntary conveyance* was made to A. with power of revocation on tender of 1 shilling. The tender was made but not at the place appointed. Afterwards the grantor makes a mortgage to B of the same lands for 500*l.* and after that an absolute assignment for 750*l.* more paid to the grantor; the grantee laid out money in repairs and building. It was decreed that A. should redeem, paying all the disbursements of building and repairs, and B. to account for all wilful spoils and waifs done, but if A. failed of payment then B. to enjoy against A. and all claiming under him. This decree was affirmed. Fin. R. 38. Mich. 25 Car. 2. Thorne v Newman.

3. An *after mortgage* of a ship, and who had got the possession of her, was decreed to be postponed to the first mortgagee as to his debt, but as to money laid out in preserving the ship by calking, pitching, oker, &c. it was ordered to be paid in the first place out of the monies arising by sale of the ship. Fin. R. 206. Pasch. 27 Car. 2. Degelder v. Depeister.

4. *Lasting improvements* shall be allowed, tho' made pending the suit. Vern. 487 Mich. 1687. Walley v. Whaley.

5. *Charges at law* in defending a suit against the heir of the mortgagor, who set up an entail, was allowed, and not only as the costs were taxed, but the whole charge the mortgagee was at; and also his charge of administration as principal creditor. 2 Vern. 536. Hill. 1705. Ramsden v. Langley.

(X. 2) Allowances to Mortgagor, his Executors &c. tho' Redemption denied.

1. **R**edemption was denied to an executor of a mortgagor, because of length of time; but because there were some *leases* expired since the mortgage, so that the estate was of better value than when first mortgaged, the Court ordered the mortgagee to allow some money for the same. N. Ch. R. 34 Gird v. Toogood.

(X. 3) Interest upon Interest, or how much.

1. **I**nterest was moderated on account of the badness of the times between 1642. and 1648. 3 Ch. R. 79. Hill. 1672. * Porter v. Hubbard; cites Mansell v. Jenkins, 21 Car. Master of the

* 2 Ch. R.
86. 24 Car. 2
3. C—N.
Ch. R. 150.

the Rolls, Lord Cobham v. Lord Rofs. 15 Car. 2. Lord Chancellor and Master of the Rolls; Lord Cornwallis and Miller 1668. Earl of Derby's case where interest was quite taken away.

—Whereby a general and national calamity nothing is made out of

lands assigned for payment of interest, it ought not to run on during the time of such calamity. MS. Tab. cites 25 June 1715 Basil v. Acheson.

2. Where a mortgage is forfeited the mortgagee shall have *interest for his interest*; per Ld. Keeper. And note, it was always a rule that, the mortgagee assigning, the *assignee* should have interest for the interest then due, and never was contradicted but in Potter and Robert's case in time of Lord Shaftsbury. Chan. Cases 258. Hill. 26 & 27 Car. per Ld. Finch. Chamberlain v. Chamberlain.

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Interest due at the time of the assigning a mortgage shall not carry interest. MS. Tab. cites 25 February

1717. Everard v. Aston.

There being a deed to let mortgagee into possession and enlarge the time of redemption, wherein was mentioned what was due for principal and interest, the question was, whether the interest then due should carry interest? it shall not there being no express agreement, that such interest should carry interest and the whole sum being mentioned for another purpose. MS. Tab. tit. interest, cites 13 January 1719. Plunket v. Macartney. — Tamen quære, for there is another reason given which might be the cause of affirming the decree. Ibid.

3. Where there is a *great arrear* of interest due on a mortgage there shall be allowed interest for the interest reserved in the body of the deed; per Lord Keeper. Vern. 194. Mich. 1683. Howard v. Harris.

4. Interest shall be upon interest where it is a *stated sum*. 2 Chan. Rep. 286. 36 Car. 2. Bradberry v. Duke of Bucks.

5. Interest prior to an *Act of Parliament of reduction*, shall continue the same till such time as the mortgagee entered on the land. 2 Vern. 42. Pasch 1688. Walker v. Penry.

2 Vern. 78. Trin. 1688. S. C. and the former decree con-

firmed; per Jeffries C. — But Trin. 1690. per Rawlinson and Hutchins contra Trevor. Commissioners held that the act of 12 Car. 2. 13. had a retrospect as to the interest so that what was received over and above the 6l. per cent. should sink so much of the principal. 2 Vern. 145. Trin. 1690. Walter v. Penry. — But if the principal and interest were over paid then the parties must shake hands. Ch. Prec. 50 Mich. 1692. S. C. — Mortgagee entered before the Act of 12 Car. 2. the plaintiff shall pay 8l. per cent. only to the time of the act, and tho' the profits could not answer the interest, yet the arrears cannot carry interest but the *costs and charges* shall. Ch. Prec. 116. Trin. 1700. Proctor v. Cooper.

6. J. S. mortgaged his estate to the plaintiff, and died leaving the defendant his daughter and heir who was an infant, and had nothing to subsist on but the rents of the mortgaged estate; and the interest being suffered to run in arrear 3 years and a half, the plaintiff grew uneasy at it, and threatened to enter on the estate, unless his interest might be made principal; upon which the defendant's mother, with the privity of her nearest relations, stated the account, and the defendant herself (who was then near of age) signed it; and the account being admitted to be fair, it was held by my Lord Chancellor, that tho' regularly interest shall not carry interest, yet that in some cases and upon some circumstances, it would be

injustice

injustice if interest should not be made principal; and the rather in this case, because it was for *the infant's benefit*, who without this agreement would have been destitute of subsistence; decreed. Abr. Equ. Cases 287. Pasch. 1699. Earl of Chesterfield v. Lady Cromwel.—And affirmed by my Lord Keeper Wright Mich. 1701.

7. A proviso that future *interest* if not paid shall be taken as principal and bear interest is void, but if interest be first *grown due* then an agreement concerning it may make it principal. 2 Salk. 449. 1707. Lord Offulton v. Ld. Yarmouth in Chan.

(Y) *Foreclosure. In what Cases, and of what, &c.*

1. *Devisee of a mortgage of a dry reversion*, brought a bill against the heir of a mortgagor to foreclose; decreed that the heir of the mortgagor shall pay the mortgage money with damages, or the lands decreed to the plaintiff to be sold for satisfaction of his debt. Chan. Rep. 32. 4 Car. 1. How v. Vignes.

[476] 2. Where a decree is to foreclose, the money not being paid, the Court in cases of inevitable necessity will *enlarge the time*, tho' the decree be signed and inrolled. Chan. Cases 64. Hill. 16 & 17 Car. 2. Cocker v. Bevis.

3. In a bill to foreclose the *heir set forth a title* in his examination, but the Court would not admit the mortgagee to debate it on this bill, on which the Court can only take away the equity of redemption and leave the plaintiff to such title as he has, but not amend it; and this was the true and ancient course, tho' of late sometimes the contrary has been done, and Ld. Finch agreed thereto and discharged the *contempt of the heir for not giving possession* according to former orders. 2 Chan. Cases 244. Trin. 30 Car. 2. Anon.

4. A mortgage was made *redeemable during the life of mortgagor*, it was held by Ld. Nottingham, that notwithstanding this, the mortgagee might have compelled him to redeem, or have foreclosed him. Vern. 8. Trin. 1681. Newcomb v. Bonham.

5. An *annuity* with a clause of distress and a *nomine pœnæ* was granted out of lands, and made *redeemable on payment of 200l.* It was decreed by Ld. Nottingham, ex parte, that the grantor be foreclosed even of the land itself. But, per Ld. North, he can only be foreclosed of the annuity; so that he shall not redeem that, but the *nomine pœna* shall run upon him, and so reversed the decree. Vern. 209. Mich. 1683. Carnfrew v. Ascott.

6. There being an *infant* in the case he cannot be foreclosed without a day to shew cause after he comes of age; but the proper way in such case is, to decree the lands to be sold to pay the debts, and that will bind the infant; per Ld. North, Vern. 295. Hill. 1684. Booth v. Rich.

7. There is a difference between mortgages of *exchequer-an-*
nuities and common stock, the value of which depends upon
 imagination, rather than real value; but *annuities* are a certain
 security, and carry a constant interest, and *are to be considered as*
mortgages of lands, and cannot be sold after forfeiture without
 foreclosure. But decree was reversed. MS. Tab. cites 1714.
 Wilfon v. Tooker.

But accord-
 ing to the
 case of
 Manning
 v. Scott,
 14 Novemb.
 1714. annu-
 ities mort-
 gaged are
 irredeem-

able after forfeiture, unless there be an *express agreement, that the mortgagee may*
sell after for-
feiture. Ibid.

8. *Chambers in Gray's-Inn* were mortgaged by A. to B. It
 seems that this Court after refusal of the Benchers of the So-
 ciety to determine the dispute as to this mortgage, or in case
 they consent that the parties go to law, in either of those
 cases, the Court will decree a foreclosure. See Select Cases
 in Chan. in Ld. King's time, 55, 56. Trin. 11 Geo. 1.
 Rakestraw v. Brewer.

See 2 Wms's
 Rep. 511.
 S. C.

(Z) Foreclosure. Opened in what Cases.

1. **A**fter a foreclosure, the *mortgagee by will disposes of the*
money on the mortgage. Upon this admission in the will
 a bill was brought to open the foreclosure. The Court took
 time to consider of it, and after the parties agreed. Cited by
 the Master of the Rolls Ld. Commissioner. Select Cases in
 Chan. in Ld. King's time. 10. as in the case of Stuckville
 v. Dolben.

A decree of
 foreclosure
 is not to be
 opened after
 several years,
 where there
 has been
 building upon
 the estate and
 settlements;

nor shall the mortgagee's calling it a debt in his will alter the nature of it. MS. Tab. cites 9 Jan-
 1705. Took v. Bishop of Ely.

2. But a decree of foreclosure was opened after 16 years the
equity of redemption being worth much more than what would be
due upon Account, and mortgagor having been distressed; and an
 account was ordered to be taken of what was due for princi-
 pal, interest, and costs, and liberty given to redeem. MS.
 Tab. tit. mortgage, cites 17 April, 1724. Burgh v. Langton.

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3. If a mortgagee has a *decree of foreclosure*, tho' that decree
 he sign'd and inrolled; yet if he after brings an action of debt
 on the bond given at the same time for payment of the money and
 performance of the covenants in the mortgage deed, such action
 opens again the foreclosure, and lets in the equity of re-
 demption of the mortgagor. Abr. Equ. Cases 317. Tr. 1729.
 Dashwood v. Blythway.

(A. a) Foreclosure. By 4 & 5 W. & M. 16.

1. 4 & 5 W. & M. **E**Naacts that if any persons shall borrow
 cap. 16. §. 2. any money, or for any other valuable
 Q q 4 considera-

This statute
 intended
 only to re-

compence
honest mort-
gages for the
trouble,
bazard, and
charge they
might be put
to, and not
to cover a
fraud or ill
practice in
obtaining an
assignment
of a mort-
gage, or in
becoming a
purchaser,
and there-
fore con-

cerns not this equity, where a man was imposed upon in the mortgage itself; as by giving great premiums, and cheated in the payments &c. 2 Vern. 591. Mich. 1707. Stafford & al. v. Selby.

If more lands
are injected
in the second
mortgage
than in the
first, that
seems to be
casus missus
out of this
statute.

This penal law is to be taken with some strictness; but the adding one or two acres shall not exempt it out of the statute, but be looked upon as a contrivance to evade the statute; per Lord Cowper. 2 Vern. 590. Mich. 1707. Stafford & al. v. Selby.

consideration for the payment thereof shall acknowledge or suffer to be entered against them a judgment, statute or recognizance, and shall afterwards borrow any other sum of any other persons, or for other valuable consideration, and for payment or discharge thereof shall mortgage lands to the second or other lender or lenders, or to any other persons in trust for him or them, and shall not give notice to the mortgagee of such judgment, statute, or recognizance, in writing before the execution of the said mortgage, unless the mortgagor or his heirs upon notice given to the mortgagee under hand and seal attested by two or more witnesses of such former judgment &c. shall in writing within six months pay off and discharge the same, and cause the same to be vacated by record, such mortgagor shall have no benefit in equity or elsewhere for redemption of the lands mortgaged.

S. 3. If any person who shall mortgage lands for security of money due, or for other valuable consideration, and shall again mortgage the same lands to any other person for valuable consideration (the former mortgage being in force) shall not discover to the second mortgagee the former mortgage under his hand, the mortgagor shall have no equity of redemption against the second mortgage.

S. 4. If there be more than one mortgage at the same time of the same lands, the last, or under mortgagees shall have power to redeem any former mortgages.

5. Nothing in this act shall bar any widow of any mortgagor from her dower, who did not legally join with her husband in such mortgage, or otherwise lawfully bar herself from her dower

If a subse-
quent mort-
gagee had re-
deemed such
foreclosing
mortgage,
he should
have held the
estate irre-
deemable;

per Lord Cowper. 2 Vern. 590. Mich. 1707. Stafford & al. v. Selby.

2. If a mortgage becomes irredeemable by the statute, and is assigned over to another in consideration of what was really due thereon for principal, interest, and costs, yet it remains irredeemable in the hands of such assignee, and such assignee may take advantage of the statute against clandestine mortgages; per Lord Cowper, 2 Vern. 590, Mich. 1707. Stafford & al. v. Selby

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3. A deed of trust was for payment of debts, and securing portions to brothers and sisters, and afterwards a mortgage; the mortgagee might have taken the advantage of the Act of Parliament, notice being given of all the prior incumbrances; per Lord Cowper, 2 Vern. 590 Mich. 1707, Stafford & al. v. Selby.

(B, a)

(B. a) Equity. Mortgagee relieved or not against Forfeitures.

1. **BY** a marriage settlement *A. and M. his wife were tenants for life, remainder to their first &c. sons successively in tail male*; after a son and several other children were born *A. and M. by lease and release and fine make a mortgage to J. D.* This is a forfeiture, and no relief for J. D. and so he lost all his money; per *Ld. Macclesfield. Chan. Prec. 591. Tr. 1722. Lady Whetstone v. Sainsbury.*

(C. a) Pleadings. In Law and Equity relating to Lands mortgaged.

1. **I**N pleading, it is sufficient to say, *quod clausum prædict. prædicto tempore consecution' script. Obl' præd' pignoratam fuit præd' A. B. &c. without saying how it was mortgaged.* Reg. Plac. 187. cap. 5. cites 3 Cro. 899.

2. *Possession under a decree of foreclosure inrolled is a good plea.* MS. Tab. tit. mortgage, cites 1713. *Wichals v Short.*

[For more of Mortgage in general, see Fraud, Incumbrances, and other proper titles.]

Mortmain.

* (A) † Mortmain.

[1] **W**ILLIAM the Conqueror, demanding the cause why he himself conquered the realm by one battle, which the Danes could not do by many; Frederick the Abbot of St. Albans answered, that the reason was, because now the land which was the maintenance of martial men, was given and converted to pious employments, and for the maintenance of holy votaries; to which the Conqueror said, that if the clergy be so strong that the realm is infeebled of men for the war, and subject by it to foreign invasion, he would aid it. And there-fore

* There is no letter at Roll.—

† The true cause of the name and the meaning thereof, is taken from the effects as it is expressed in the Statute itself

&c. so as
the lands
were said to
come to dead

hands as to the *lords*; for that by alienation in mortmain they *lost* wholly *their escheats*, and in effect their knight's-service for the defence of the realm, wards, marriages, reliefs, and the like, and therefore was called a dead hand; for that a dead hand yieldeth no service. Co. Litt. 2. b.

Fol. 129.

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This is under the title mortuary, in Roll, but seems to be misplaced, and should be under the title Mortmain.—* Orig. (al)—† Orig. (manas.)

fore he took away many of the revenues of the said Abbot, and of others also. Speed. 418. b.]

[2. In the time of the Saxons it was not lawful to give possessions to an * abbey without the king's licence; for anno domini 1006, a minister of king Etheldred called *Ulfrick Spot* built the abbey of *Burton* in *Staffordshire*, and endowed it with possessions, and gave to the king 300 † marks of gold for his confirmation, and to every bishop 5 marks, and to *Alfrick* archbishop of *Canterbury* the town of *Dumbleton*. The ancient book of *Abingdon* cited in *Janus Anglorum*. 91. 45.]

(A. 2) Statutes.

Lord Coke
in his 2 Inst.
74 says, this
statute is ex-
cellently a-
bridged and
expounded

1. 9 H. 3. cap. 36. ENACTS, that it shall not be lawful from henceforth to any to give his lands to any religious house, and to take the same lands again to hold of the same house &c. upon pain that the gift shall be void, and that the land shall accrue to the lord of the fee.

by the statute of 7 E. 1. [which see pl. 2]—There were two causes of making this statute, [as therein appears] 1st. The withdrawing the services created for defence of the realm. And 2dly, the chief lords losing the escheats &c. To prevent which Ld. Coke observes, that given provident lords at the creation of the feignory had a clause in the deed of feoffment, viz. *quod licet sum sit donatori* [so is this word there, but quære if it should not be (donato) viz. the doctee] *non donatam dare vel vendere, cui voluerit exceptis viris religiosis & judæis*. 2 Inst. 75 cites Bract. lib. 1. fol. 13. and says, that he had seen many of those deeds; but says, that the ecclesiastical persons regular found many ways to creep out of this statute, as by purchasing lands held of themselves, or taking leases for long terms of years &c. And that bishops, parsons, and other ecclesiastical persons secular took themselves to be out of this statute, the which devices the statute of 7 E. 1. intended to provide against, and therefore enacted, that &c. [as in pl. 2.]

This statute
does not ex-
tend to gifts
to religious
persons by
the king, but
that he may
give lands
to them as
well as to
any other
without any
forfeiture.
Arg. Pl. C.
240 b.—

* By the
words
(other per-
son whatso-
ever) is
meant, other
whatsoever

2. 7 E. 1. Where of late it was provided, that religious men should not enter into the fees of any without licence and will of the chief lord of whom such fees be holden immediately, and notwithstanding such religious men have entered as well into their own fees as in the fees of other men, appropriating and buying them, and sometimes receiving them of the gift of others, whereby the services due of such fees, and which at the beginning were provided for defence of the realm, are wrongfully withdrawn, and the chief lords lose their escheats of the same, it is ordained, that no persons religious, or * other whatsoever, body politick, ecclesiastical or lay, sole or aggregate, shall buy or sell any lands or tenements, or under the colour of gift or lease, or by reason of any other title receive the same, or † by any other craft or engine shall presume to appropriate them to himself, whereby such lands may in any wise come into mortmain, under pain of forfeiture of the same; and within a year after the alienation

the † next lord of the fee may enter, and if he do not, then the next immediate lord from time to time to have half a year; and for default of all the mesne lords, the King shall have the lands so alienated for ever, and shall infeoff others by certain services.

of like quality, as being a body politick or corporate, ecclesiastical

or lay, sole or aggregate of many. 2 Inst. 75.

† These words were added to prevent all other inventions and evasions. But as this statute extended only to gifts, alienations, and other conveyances made between them and others by craft &c. they took into a new method, and pretending a title in the land, which they meant to get, brought a præcipe quod reddat against the tenant of the land, and he by collusion was to make default, and so they should recover the land and enter by judgment of law, et sic fieret fraus Statute. And when this new invention was provided for and taken away by the statute of W. 2. yet they found out another evasion out of all these statutes; for now [since] they would [could] neither get any land by purchase, gift, lease, or recovery, they caused the lands to be conveyed by scoffment, and in other manner to diverse persons and their heirs to the use of them and their successors, by reason whereof they took the profits. But the statute of 15 R. 2. enacted this to be mortmain within the forfeiture of the statute of 7 E. 1. But the foundation of all these statutes was 9 H. 3. Magna Charta cap. 36. 2 Inst. 75.———|| S. P. 2. Inst. 429.

‡ If there are lord and tenant, and the tenant aliens in mortmain, and the lord enters, yet he shall have but such estate in the land as he had in the seignory, notwithstanding this statute; for if he hath not but for life or in tail in the seignory, he shall have the greater estate in the land; for so is the intendment of the statute; but the lord of the particular estate shall have perquisite of villain in fee. But by 18 E. 3. 29. if he has not but in jure uxoris, or ecclesiæ, he [480] shall not have it but in jure uxoris or ecclesiæ. Quod Nota. Br. Estates, pl. 42. cites 5 E. 4. 61.

¶ This is to be understood of such inheritances as may be holden; but of such inheritances as are not holden, as villains, rent-charges, commons &c. the King shall have them presently by a favourable construction of the statute. An annuity granted to them is not mortmain, because it charges the person only. Co. Litt. 2 b.

3. Westm. 2. 13. E. 1. Stat. 1. cap. 32. S. 1. When religious men, and other ecclesiastical persons do implead any, and the party impleaded makes * default, whereby he ought to leese the land, forasmuch as the justices have thought hitherto, that if the party impleaded make default by collusion, that where the demandant, by occasion of the statute, could not obtain seisin of the land by title or gift, or other alienation, he shall now by reason of default, and so the statute is defrauded.

* This act extends not only to recoveries by default according to the letter, but to all manner of recoveries by verdict

or otherwise, if they be had by collusion. If it be by default, then a judicial writ, called a quale jus grounded upon this statute is awarded, consisting of five parts; 1st. It recites the recovery. 2dly, The doubt of the fraud. 3dly, A precept to the sheriff to return a jury ad recogn. &c. 1st Quale jus idem Abbas habuit in prædicto mesuagio &c. 2dly, Et quis prædecessorum fuit inde seifitus ut de jure ecclesiæ lxx præd. 3dly, Et quantum illud mesuagium * valet per annum. 4thly, Another precept to the sheriff; viz. Et interim mesuagium illud in manum nostram capias &c. Et quod de exitibus ad Scaccarium nobis respondeas. 5thly, Et scire facias capitalibus dominis feodi illius mediatis & immediatis, quod sint ibi audituri juratam illam, si voluerint. And if the jury find that his predecessor was seised thereof in his demesne as of fee in right of his church, before the said statute of 7 E. 1. this is a good verdict for the demandant without finding of any licence; for though there were no licence, the alienation was good: but if they find that his predecessor was seised after the statute, then they ought to find a licence, or otherwise the land belongeth to the lord or King. 2 Inst. 430.

* The value of the lands is inquired of, because the issues thereof are to be by this act, answered to the King. Ibid.

S. 2. It is ordained by our lord the King, and granted, that in this case, after the † default made, it shall be ‡ inquired by the country, whether the demandant had right in the thing demanded or no, and if it be * found that the demandant had right in his demand, the † judgment shall pass with him, and he shall recover seisin; and if he has no right, the land shall accrue to the next lord of the fee, if he demand it within a year from the time of the inquest taken,

* This is either upon trial of the issue, or by quale jus if the tenant makes default. 2 Inst. 430.

† Hereby it appeareth that the *quale jus* should be sued out after the default, and before judgment, and so it is said the use has been; and if the collusion be found, the lord &c. shall enter, though judgment be never given. 2 Inst. 430.

But if judgment be given upon the default, yet may the *quale jus* be sued out, and so it appeareth by the judicial register, and many other authorities, but execution shall cease until the collusion be inquired. Ibid.

In a writ of right if judgment final be given for the abbot &c. the collusion shall be inquired; for albeit the judgment shall be given between them, yet the lord by this statute shall enter. Ibid.

And so it is of a recovery by default in a cessavit. 2 Inst. 430.

† If there be an issue joined in the action brought by the abbot, the jury shall not only inquire of the issue, but of the collusion; but as concerning the collusion, it is but an inquest of office, whereof no attaineth. Ibid.

If a recovery by verdict were not within the purview of this act, such an issue of disadvantage might be joined, and so feint evidence might be given, as this statute should be of little force. 2 Inst. 430.

And if the jury do not inquire of the collusion, so as the abbot &c. recover by verdict, yet the collusion shall be inquired of by a special writ, and not by a *quale jus*. Ibid.

If an abbot bring an assise, and the tenant plead a foreign release, they of the foreign country cannot inquire of the collusion, but a special writ shall be granted. Ibid.

If the tenant appear and confess the action, or judgment be given upon a *nil dicit*, or a departure in despite of the court, these also are within this statute, and the collusion shall be inquired; and so if a recovery be had upon a demurrer in law, that recovery is also within the equity of this statute. 2 Inst. 430.

In some case no collusion shall be inquired at all; as if a person bring a *juris utrum*, and the jury find that the land is the right of the church, this sufficeth without inquiring of the collusion. 2 Inst. 430.

S. 3. And if he do not demand it within the year, it shall accrue to the next lord above, if he do demand it within half a year after the same year.

S. 4. And so every lord after the next lord shall have the space of half a year to demand it successively, until it come to the King, to whom at length, through default of other lords, the lands shall accrue.

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S. 5. And to * challenge the jurors of the inquest, every one of the chief lords of the fees shall be admitted, and likewise † for the King they that will shall challenge

* If any of the lords mediate or immediate be within age, the Court in respect of these words, *quicunque domini feodorum*, will advise whether any thing shall be done to his prejudice during his minority. 2 Inst. 430, 431.

† The King is always (in judgment of law) present in Court, and therefore any man may challenge for the King, but by the statute of 33 E. 1. they which challenge for the King must shew a cause certain, and the truth thereof is to be tried. 2 Inst. 431.

S. 6. And after the judgment given the land shall remain clear in the King's hands, until it be dereigned by the demandant, or some chief lord, and the sheriff shall be charged to answer therefore at the Exchequer.

See (D 2)
(D 3) 4. By 27 E. 1. *Ordinatio de perquirendis libertatibus*. To obtain licence to amortize lands a writ of *ad quod damnum* shall issue out of the Chancery to enquire concerning the same.

5. Stat. of amortizing lands 34 E. 1. enacts, that lands shall not be alienated in mortmain where there be mesne lords, without their consent declared under their seals; neither shall any thing pass where the donor reserveth nothing to himself, or when the inquisition is made and returned without warranty, viz. without the writ original returned with the inquisition; and unless the original make mention of every thing according to the new ordinance devised by the King.

6. 23 H. 8. 10. *If any grant of lands or other hereditaments shall be made in trust to the use of any churches, chapels, churchwardens, guilds, fraternities, commonalties, companies, or brotherhoods, to have perpetual obits, or a continual service of a priest for ever, or for 60 or 80 years, or to such like uses or intents, and purposes, shall be void, they being no corporations, but erected either of devotion, or else by common consent of the people*

Lands devised to one and his heirs on condition to assure them for maintenance of a grammar school for ever was held to be a

good and charitable use, and such as this act did not extend to take away. 1 Rep. 22. b. Mich. 34 & 35 Eliz. in the Exchequer, the Queen v. Porter.—Als. Porter's case.—S. C. cited 11. Rep. 71. b. Pasch. 13 Jac. in Magdalen's College case.—S. P. in B. R. in the same term; and it was there likewise held, that this statute extended only to superstitious uses, and not to restrain uses that were in favour of learning and relief of the poor. Cro. E. 288. Martidale v. Martin ——— At the end of Porter's case supra is a note of the reporter, that any man at this day may give lands, tenements, or hereditaments to any person or persons, and their heirs, for the finding of a preacher, maintenance of a school, relief and comfort of maimed soldiers, sustenance of poor people, reparations of churches, highways, bridges, causeways, discharging of poor inhabitants of a vill of common charges, to make a stock for poor labourers in husbandry, and poor apprentices, and marriage of poor virgins, and for any other charitable uses; and that it is good policy upon every such feoffment or estate, to reserve to the feoffor and his heirs, a small rent, or to express any such consideration of any small sum for the cause before rehearsed.

S. 3. *Such uses and intents may be made and declared to continue twenty years from the time of such limiting of them, but no longer.*

S. 4. *Collateral assurances made for the defeating of this statute shall be void, and this shall be interpreted most beneficially for the destruction of such uses as aforesaid.*

S. 5. *This act shall not prejudice corporations, where there is a custom to devise lands in mortmain.*

S. 6. *This act shall not prejudice the executors of Jannis and Terry, late aldermen of Norwich.*

7. 17 Car. 2. cap. 3. S. 7. Enacts, that every owner of any impropriation or tithes, may give and annex the same to the parsonage or vicarage of the parish church where the same lie, or settle the same in trust for the parsonage &c. or of the curates there successively where the parsonage is impropriated and no vicar endowed, without licence of mortmain.

S. 8. *If the settled maintenance of any parsonage or vicarage with cure shall not amount to 100l. per annum, it shall be lawful for the incumbent to purchase to him and his successors, lands, rents, tithes, or other hereditaments, without licence of mortmain.* [482]

8. 22. Car. cap. 6. S. 10. Enacts, that it shall be lawful for bodies politick to purchase any fee farm rents &c. and the same so retain, any statutes of mortmain notwithstanding.

9. 7 & 8 Will. 3. cap. 37. S. 1. Enacts, that it shall be lawful for the King to grant to any person licence to alien in mortmain, and to purchase and hold in mortmain any lands or hereditaments.

S. 2. *Lands so aliened, or acquired and licensed, shall not be subject to forfeiture.*

10. 2 & 3 Ann. cap. 11. S. 1. Enacts, that it shall be lawful for her Majesty by letters patent under the great seal, to incorporate

corporate such persons as her Majesty shall appoint, to be one body politick and corporate; and by the same or any other letters patents to grant to the said corporation and their successors for ever all the revenues of the first fruits, and yearly perpetual tenths of all dignities, offices, benefices, and promotions spiritual whatsoever, to be applied to the augmentation of the maintenance of such persons, vicars, curates, and ministers officiating in any church or chapel in England, Wales, or Berwick, where the liturgy and rites of the church of England, as now by law established, shall be used, with such powers, rules, and restrictions as shall be therein expressed.

S. 2. And every person having in his own right any estate or interest in possession, reversion, or contingency, in any lands, tenements, or hereditaments, or any property in any goods or chattels, shall have power by deed inrolled according to the stat. of 27 H. 8. for inrolment of bargains and sales, or by his last will and testament duly executed, to give, grant, and vest in the said corporation and their successors, all such his estate, interest, or property in such lands, tenements, and hereditaments, goods and chattels, for the augmentation of the maintenance of such ministers as aforesaid, to be applied according to the will of the said benefactor in and by such deed inrolled, or by such will as aforesaid expressed; and in default of such appointment in such manner as by her Majesty's letters patents shall be directed as aforesaid; and such corporation shall have ability to purchase, take, and enjoy for the purposes aforesaid as well as from such persons so charitably disposed, as from all other persons willing to sell or alien to the said corporation, any manors, lands, tenements, goods, or chattels, without any licence or writ of ad quod damnum, notwithstanding the statute of mortmain &c.

11. 9 Geo. 2 cap. 36. S. 1. No manors, lands, advowsons, or other hereditaments, nor any money or other personal estate to be laid out in lands &c. shall be given to any bodies politick or otherwise, or any ways charged in trust for charitable uses, unless such gift (other than stocks in the publick funds) be made by deed indented, in presence of two witnesses, twelve kalendar months before the death of such donor, and be inrolled in Chancery within six kalendar months after execution, and unless such stocks be transferred six kalendar months before the death of such donor; and unless the same be made to take effect in possession immediately from the making, and be without power of revocation.

S. 2. Nothing herein relating to the sealing and delivery of any deed twelve kalendar months before the death of the grantor, or to the transfer of stock six kalendar months before the death of the grantor, shall extend to any purchase for a full and valuable consideration.

S. 3. All gifts of lands &c. or of any charge affecting lands, or of any stock or personal estate to be laid out in lands &c. for charitable uses, which shall be made in any other manner, shall be void.

S. 4. This

S. 4. *This act shall not make void dispositions of any lands to either of the universities, or the colleges or houses within either of them, or to the colleges of Eton, Winchester, or Westminster, for the better support of the scholars upon the foundations.*

S. 5. *No such college or house which shall hold so many advowsons as are equal in number to one moiety of the fellows, or where there are no fellows to one moiety of the students upon the foundation, shall be capable of purchasing any other advowsons of benefices annexed to the headships of colleges or houses not being computed.*

S. 6. *Nothing in this act shall extend to Scotland.*

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(B) *What is Mortmain.*

1. **I**F a tenant gives his land to a religious house to hold by lesser services of him than he holds over by, it is mortmain, and the lord may enter by the statute of Magna Char. Br. Affise, pl. 456. cites 23 H. 3. and Fitzh. Affise 436.

2. In Affise, it appear'd that one abbot cannot alien to another abbot without losing their land by the statutes of mortmain, and therefore the collusion was inquired between them as between religious and secular. Br. Mortmain, pl. 19. cites 16 Aff. 1.

3. Que impedit the plaintiff made title as lord, because an abbot was patron of an advowson and presented such a one, who was received &c and after the abbot by licence of the King and the ordinary appropriated the advowson to himself without licence of the lord, by which he seised within the year, and so it belongs to him to present; and per Cur. this is not mortmain, because it is a spiritual thing, and the abbot had it before; for before he was patron only, and now he is parson and patron, viz. Incumbent and patron, and therefore no mortmain; quod nota. Br. Mortmain, pl. 12. cites 21 E. 3. 5.

But per Shard, where there is lord, mesne, and tenant, and the mesne is abbot and purchases the tenancy, it is mortmain, and the lord may enter;

Contra per Mombrey and Wilby. *ibid.*

4. In writ of customs and services the lord released to the abbot tenant 5s. rent in fee, and the Court said that the fine was receivable, because it was not as a purchase of the rent, but extinguishment in the hands of the tenant, and so the fine receivable though he was a man of religion; and therefore it seems that it is not mortmain; for when it is extinct none may enter into it; but no word of mortmain is expressed there; but see New Nat. Br. 233. per Fitzh. it is mortmain, and writ of *ad quod damnum* shall issue upon licence of alienation of such rent by release. Br. Mortmain, pl. 16. cites 21 E. 3. 18.

S. P. Br. Mortmain, pl. 31. cites S. C. accordingly, & New Nat. Br. contra. And Brook says the law seems to be with Fitzh. For the lord of the abbot is so much more

in value per ann. and the statute says *arte vel ingenio*.

5. An abbot was impeached in the Exchequer, for that he had purchased a release of certain rent of the King's tenant who was

was mesne between the King and him, and was put to answer why he should not be attendant of these services to the King, and he should make fine; the abbot said that he who is supposed to release enfeoffed his predecessor in frankalmoign, and so was he tenant to the King as before &c Brooke makes a quære if it shall be intended mortmain by the release, and says it seems it shall not, by reason of the fine; for by mortmain the land is forfeited, and where the land is forfeited no fine is used to be paid. Br. Mortmain, pl. 20. cites 38 Aff. 17.

As to a vicar and his successors; and by such alienation they have it in right of the church, by reason of these words, parson or vicar and successors; if it was to their heirs. Ibid.

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Office was found that 4 acres of land were devised to a man in fee so that he and his heirs should pay yearly 6l. to maintain a chaplain to celebrate yearly for ever in the church of St. Leonard in Engheloup, and that the rector and 4 parishioners for the time being should levy the aforesaid rent whosoever, and as often as it should be arrear, and this matter confessed in Chancery, was adjudged mortmain, by which execution was awarded to the King; quod mirum!

6. Note, it appears in Juris Utrum 40 E. 3 that where a man *aliens to a parson and his successors* it is a mortmain; for it is said there, that it cannot be without licence. Br. Mortmain, pl. 3. cites 40 E. 3. 28.

right of the church, by reason of these words, parson or vicar and successors; if it was to their heirs. Ibid.

7. Office was found before A. B. mayor and escheator of London, that R. of E. was seised of tenements in Wood-street London in fee, and *devised* the tenements by testament to H. D. *in fee to pay annually 12l. and to find two chaplains to chaunt for his soul for ever in the church of St. Alban's in Wood-street, by these words, viz. To find 12l. for two chaplains, and devised to the rector of the church there 6s. 8d. a year to find for the same chaplains vestments, calice, candle, and other necessities for celebrating the same, and died, and scire facias for the mortmain issued to the two chaplains as tenants of the 12l. if they had any thing to say why the King ought not to have that 12l. and the parson was warned for the 6s. 8d. rent. And it was held by the best opinion, because the two chaplains are not perpetual, scil' as it seems they are not incorporated, that therefore the 12l. for the two chaplains is not mortmain; by which Lud said that by the usage of the city upon such devise, it is leviable by the ministers of the city at the suit of him who is parson and of the parishioners, and because it is leviable in perpetuity, therefore it is mortmain; by which Knivet J. awarded that because the defendant had not deny'd that the rent was devised to find a chaplain, and *in the testament is comprised that the parishioners and the parson of the church may distrain for the rent perpetually when it is arrear, which is maintained by the usage, which usage you have not deny'd, and the parson of the church is perpetual and therefore amortisement in law; so the Court awarded that the King have execution of this rent, but in the one chantry was not comprised disreys, and therefore in this no mortmain.* Br. Mortmain, pl. 21. cites 40 Aff. 29. [but it should be 26.]*

for here was not any corporation which may take the rent; Br. Mortmain, pl. 24. cites

43 Aff. 33.

8. And by the same testament 6s. 8d. a year was *devised for the sustenance of a lamp in the same church, which was adjudged*

adjudged per Cur. to be no mortmain; and of this the defendant went quit; quod nota. Ibid.

9. In præcipe quod reddat it was agreed, that if the *villein of a bishop purchases and the lord enters* it is mortmain; yet he may retain against the villein. Br. Mortmain, pl. 4. cites * 4 E. 3. 116.

The bishop cannot enter without the King's licence, and if he do it is mortmain. And it seems

that the law is such, because there is a writ of *ad quod damnum* in the register to inquire to whose damage the same is. F. N. B. 224. (B)———* It should be 41 E. 3. 16.

10. But if a *villein of a bishop purchases land and dies, and his heir enters, and the bishop enters upon the heir by reason of the purchase* by his villein, and *the heir ousts him*, and the bishop brings assise and recovers, it is no mortmain; for *covin cannot be intended*, inasmuch as the lord permits the villein who purchased to die seised and his heir to enter; contra if the lord had entered upon the purchaser. Br. Mortmain, pl. 32. cites 41 Aff. 4.

11. Office was found before the Mayor of London, that A. B. had *devised certain land to his executors to provide a fit chaplain in the church of B. for ever to celebrate, which said chaplain should perceive yearly of the aforesaid lands 6 marks, which J. S. now holds*; and it was adjudged that this was not mortmain. Br. Mortmain, pl. 23. cites 43 Aff. 27.

It was found by office that A. B. devised certain land and 2s. rent to maintain a chaplain in the church

of C. yearly for ever to celebrate, and *will'd that his executors should appoint the aforesaid chaplain*, and it was found that the executors did nothing, but that J. who was the next heir entered and aliened the land and rent, and so several alienations, and nothing was done, and now W. T. is seised by feoffment, and because no chaplain was found, nor the executors did any thing, therefore no mortmain, and so was the opinion of the Court. Br. Mortmain, pl. 23. cites 43 Aff. 27.

12. Where *an abbot has right to land, but the entry is not lawful, and he enters and the tenant ousts him and he brings assise and recovers by false verdict, & quare jus issues*, which finds that the abbot had right but cannot enter upon the possession, the King shall seise; quod nota; for tho' he has right to the land by writ of right, yet if there be covin in the recovery by the assise, which is an action possessory, the King shall seise, and the abbot shall sue to the King by petition of right, per Cur. Br. Mortmain, pl. 33. cites 44 Aff. 26.

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13. In præcipe quod reddat it was awarded that *abbot may vouch and recover in value upon true warranty, and shall have execution, and so not within the statute*. Quod Nota. Br. Mortmain, pl. 43. cites 45 E. 3. 18, 19.

14. If a *rent-charge* be granted to *an abbot and his successors for 80 years*, it is mortmain; for the statute de religiosis anno 7 E. 1. is that they shall not appropriate lands nor tenements under colour of terms &c. quære. Br. Mortmain, pl. 15. cites 4 H. 6. 9.

15. If an *abbot has a rent out of my land, and I grant to him that he may distrain for the same rent out of other land*, this is not mortmain; for he has nothing but the ancient rent. Br. Mortmain, pl. 30. cites 9 H. 6. 9.

F. N. B. 224. (G) says that if an abbot, or a dean and

chapter have
a rent in fee
issuing out
of lands,
and the
tenant of
the land
will grant
by his deed

that they and their successors shall distrain for that rent in other lands, it appears by the register that he ought to have the King's licence to make such grant; and a writ of *ad quod damnum* shall be to inquire what damage or prejudice the same shall be to the King or others &c. and yet it is hard to prove how that shall be taken to be within the words of the statute of mortmain: because such grant is a good grant of a rent in fee; tho' there were not such rent before to the abbey, or dean and chapter. It seems that the grant made without licence shall be as a new grant in law. *Tamen Quære.*

16. *And it was agreed per tot. cur. that of common right a man cannot distrain for rent but in the same land out of which it issues; but by grant of the party himself he may distrain in other land as here; and it was held that it is not mortmain, because it is no new rent, but the ancient rent.* Br. Mortmain, pl. 30. cites 9 H. 6. 9.

17. If an *abbot recovers in writ of annuity, quale jus* shall not issue; for it is not mortmain; because nothing is charged but the person. Br. Mortmain, pl. 1. cites 20 H. 6. 7. per Paston and Newton.

18. *Exchange with a religious is mortmain.* Br. Mortmain, pl. 41. cites F. N. B. 223.

19. *Lord and tenant; the tenant makes a feoffment in fee to the use of A. B. for life, and after to the use of an abbot and his successors; this is not mortmain till the tenant for life in use dies, and he in remainder takes the profits; and so it was adjudged in C. B. in the time of Brudenell; and appropriation of advowson without licence is mortmain.* Br. Mortmain, pl. 37. cites M. 25 H. 8.

For the statute de religious an- no 7 E. 1. is that none

(shall buy &c.)
Ibid. —

20. If a man leases to a religious person for 100 years, and so from * 100 years to 100 years, until 800 years are incur'd, it is mortmain. Br. Mortmain, pl. 39. cites H. 29 H. 8.

Br. Mortmain, pl. 39. cites 29 H. 8. — So of a lease for 400 years &c. S. P. 2 Le. 83.

* So it is in the original but it seems it should be (That it is;

For it is not an usual term, but &c.) or to make it consistent with what follows, it may be that, viz. (That it is not; for it is a usual term. But (however) 99 years is not &c. — Per Neale, lease for † 100 or 200 years is mortmain for the length of time; for colour of a term &c. Br. Mortmain, pl. 27. cites 3 E. 4. 13, 14.

† S. P. contra per Warburton J. Arg. viz. that a lease for 100 years is mortmain. 2 Browl. 197. in case of Rowles v. Mason.

22. But if a man leases for 100 years or the like, and covenants that he or his heirs at the end of the 100 years shall make another lease for 100 years and so on, it is not mortmain; for it is not but a lease for 100 years, and the rest is only covenant, but otherwise in the first case; for that is for 800 years at first in effect, and all by one and the same deed. Ibid.

23. A vicaridge may be endowed without consent of the King, and it is not mortmain; per Jones J. Palm. 427. Patch. 2 C. & B. R. in case of Cope v. Bedford.

(B. 2) What

(B. 2) What is. *By Estoppel.*

1. **NOTE**, it was agreed arguendo in cessavit, that if the tenant in cessavit by a bishop comes and confesses the tenure and tenders the arrears as the demandant counted, where in truth the land is held of another man, he shall gain the seigniorship upon the tenant by conclusion, which is forfeited to the King by mortmain. *So of a rent-charge confessed by a receiver to an abbot. Ibid.*
Br. Mortmain, pl. 9. cites 50 E. 3. 22. 23.

(B. 3) What is. *By Covin.*

1. **THE** King purchased 10 acres of land held of the bishop of W. of M. the bishop's tenant, and this was for a habitation for the Friars Carmelites (they having no place to inhabit in) and because M. could not grant the said land by reason of the statute of mortmain, the said M. and the friars (to toll the seigniorship of the bishop, which stood in their way, and so evade the statute of mortmain) granted the 10 acres to the King, his heirs and successors, by which the seigniorship of the bishop would be extinct, with intent that the King should grant it over to the friars, which he did accordingly; and because this was by covin before, and to toll the bishop of his seigniorship, it was adjudged that the charter be repealed, and that the friars be distrained to deliver up the charter to be cancelled. 11 Rep. 73. b. 74. a. Pasch. 13 Jac. B. R. in *Magdalen College's case*, cites 17 E. 3. 59. b. *This was on a sci fa brought by the bishop, and part of the judgment was, that the land be seized into the hands of the King. 17 E. 3. 59. b. pl. 58.—Fitzh. tit. Petition, pl. 21.—And tho' this seemed to be a work of piety and*

charity to provide an habitation for them who had none before, and were of profession of religion, yet it was observed, that it was contrary to the rule of *non facias malum ut inde fiat bonum*; and also that this charter was adjudged to be repealed by the common law. 11 Rep. 74. a.

2. In *assise against the bishop of E.* the seisin and the disseisin was found, and that *Alice purchased the land in fee, and took to Baron J. who was villein of the bishop, and had issue A. and died, and A. entered, and had issue B. and died, and B. entered, and had issue C. and died, and S. entered, upon whom the bishop entered as in the land of his villein, viz. upon the third descent; and by some, because it has continued by three descents, and was purchased by a frank-feme, and not by the villein; this is no collusion, but the entry of the bishop good, and the lord cannot enter for the mortmain; quære; for adjournatur.* Br. Mortmain, pl. 5. cites 41 E. 3. 21.—But 41 Ass. 4. Judgment was given for the Bishop. Ibid.

(B. 4) Prohibited. *In what Cases. To whom.*

1. **Q**uia emptores terrarum &c. 18 E. 1 cap. 3. enacts that by the sales or purchases of lands or tenements, or any parcel of *A dispensation within this statute may be*
R 12

made by the King and all the lords of them [within the said statute] such lands or tenements shall in no wise come into mortmain, either in part or in whole, neither by policy or by craft contrary to the statute [7 E. 1.] thereupon of late.

immediate and mediate. And the licence of the lords immediate and mediate in this case shall enure to two intents, viz. To a dispensation both of the statute of *quia emptores terrarum*, and of the statutes of mortmain, because their deeds shall be taken most strongly against themselves. But it is a safe and good policy in the King's licence to have a non obstante also of the statutes of mortmain, and not only a non obstante of the statute of *quia emptores terrarum*. Co. Litt. 98. b. 99. a.

Otherwise it is a damage to the country. F. N. B. 221. N. B. 222. (B).
2. He who aliens in mortmain ought to leave sufficient in his hands to pass in juries Br. Ad quod Damnum, pl. 1. cites F. N. B. 221.

And in the writ of ad quod damnum shall be this clause. viz. Et quod iidem &c. in assis, juratis & aliis recognitionibus quibuscunque poni possint. By which it appears, that they ought to have sufficient lands besides to descend to their heirs. F. N. B. 222. (B).
3. So where a priest or feme aliens in mortmain. Ibid.

4. A fine of lands to be amortis'd to St. John's college in Oxon by Sir Thomas White was refused to be ingrossed, pro defectu brevis inde directi judicariis de Banco to pass such fine. D. 188. pl. 9. Mich. 2 & 3 Eliz.—cites likewise Cardinal Wolsey's case, as to Christ-Church college's and also Queen's college's case in Cambridge, where such a fine was rejected for the same reason.

(C) Forfeiture; and to whom.

1. WHERE a rent-charge is granted in mortmain, the King shall have it, but no other Lord; for there is no tenure of it; and so see that the King shall have it, and yet the statute says, that the chief lord shall immediately enter. Br. Mortmain, pl. 12. cites 21 E. 3. 5.

2. In assise, if tenant in tail aliens in mortmain, and dies, his heir shall not be barred; quod nota, per Gascoine; for the statute of West. 2. de donis conditionalibus, is after the statute of mortmain; for the statute of mortmain is anno 7 E. 1, and the statute of West. 2. de donis &c. is anno 13 E. 1, Br. Mortmain, pl. 10. cites 8 H. 4. 9.

(C. 2.) Entry for Forfeiture. In what Cases.

1. IN Assise, where the King licenced the prioress of Kilborn to purchase land to her successors notwithstanding the statute of mortmain; there, if she purchases land which she holds of two, where several mesne lords are mesne between the tenant and the King, and the lords neglect their title of entry, yet the King

King by this has no new title to enter, but is *excluded by his licence*; quod nota. Br. mortmain, pl. 22. cites 43 Aff 19.

2. In quare impedit, per Norton, if *tenant, who has no right in the land, by licence of the King and chief lord gives the land to mortmain, if the abbot gets a release or confirmation from him who has right, the King cannot enter; for this release is extinguishment of right, and the abbot is in by the first feoffor.* Br. Mortmain, pl. 18. cites 11 H. 4. 88.

And hence it follows, as it seems, that if disseisor gives in mortmain by licence of the King, and the chief

lord, and the disseisee releases to the abbot all his right, the chief lord or the King cannot enter; for this does not countervail entry and feoffment. Ibid.—S. P. For the tenant is in by the first feoffor by licence; for release to him who is in by title goes by extinguishment of right. Br. [488] Mortmain, pl. 38. cites S. C.—*But where the abbot is disseised, and the King or chief lord releases or confirms to him, and after the disseisee releases to the abbot all his right, it seems the King or chief lord may enter; for this countervails entry and feoffment, and then it is a new mortmain; quare inde.* Br. Mortmain, pl. 18. cites S. C.

3. If he in remainder aliens in mortmain the lord may enter; per Littleton. Br. prerogative, pl. 25. cites 15 H. 4 11.

* So are all the editions, but it should be 15 E. 4. and this

point is there at fol. 13. a.

4. No charter of the King will bar the entry of the next immediate lord which is given by the statute for an alienation in mortmain to a corporation; and this seems always to have been agreed, because it is a settled rule, that the King cannot prejudice the interest of the party. 2 Hawk. Pl. C. 390. cap. 37. S. 29.

(C. 3) Entry for Forfeiture, *at what Time.*

See (A 2) pl. 2. and in the notes there.

1. **A** Seignior is granted to a man in tail, the remainder to B. in tail; the tenant aliens in Mortmain, the first tenant in tail does not enter within the year, by which the next lord enters; the tenant in tail dies without issue; he in remainder enters within the half year; the lord re-ousts him, and he brings assise and is barred, because the tenant in tail and he in remainder had only one seignior, and are but one lord, and both shall have but one year by the statute, and therefore the laches of the tenant in tail shall prejudice him in remainder; and the law seems to be the same of the issue in tail. Br. Mortmain, pl. 17. cites 39 E. 3. 38.

Br. Taille and Dones &c. pl. 18. cites S. C.

2. If there be tenant for life remainder over of a seignior, and the tenant of the land aliens in mortmain, they both shall have but one entry, viz. but one year and day to enter Br. Done &c. pl. 6. cites 40 E. 3. 9.

S. P. Br. Entre Cong. pl. 17. cites 50 E. 3. 21. and Br.

Mortmain, pl. 8. cites 50 E. 3. 21. 22. For they are but one and the same estate; quod nota arguendo.

3. Descent within a year after alienation in mortmain does not take away the entry within the year; for it is but title of entry

Br. quare Imp. pl. 42. cites S. C. and 18 E. 3.

121.—S. P. and *not right of entry*; for upon right of entry he may have an action. Br. Mortmain, pl. 6. Br. Entre Cong. pl. 13. cites 47 E. 3. 11.

cites 47 E. 3. 10, 11. but *contra* of him who has a right of entry and may have action.—And where a man alienates an advowson in mortmain, and the alienee presents diverse times, yet the King or other * next lord may present at the next avoidance if it be *within the year*; because there is no right to have writ of right, but only a title which may be taken any time within the year; quod nota. Ibid.

* S. P. tho' the church be full by six months before his quære impedit brought, so that he brings it within the year; quod nota. Br. Mortmain, pl. 13. cites 21 E. 3. 27.—Br. Quære Impedit, pl. 70. cites S. C.

4. Where a lease is made for life, the remainder over in fee, there if he in remainder aliens in mortmain, the lord shall have a year to enter; but it seems that he cannot enter till after the death of the tenant for life, but he may claim it before as it seems. Br. Mortmain, pl. 14. cites 15 E. 4. 13.

5. The year to enter for mortmain shall be accounted the next day after the alienation, and where the King dies one day, and another King is made the same day, this day shall be the day of the old King; quod quære; for otherwise it is computed 1 E. 6. and if he mistake his day this shall be at his peril in mortmain; but it was said that it was not greatly argued by the Court nor adjudged. Br. Jours. pl. 49 cites 7 H. 7. 5.

6. Lord and tenant, the tenant leases for life to J. S. the remainder to an abbot and his successor, the lord need not make claim till the tenant for life be dead; for if he will wave the remainder, it is not mortmain. Br. Mortmain, pl. 37. cites Mich. 25 H. 8.

[489] (D) Licences to alien in Mortmain, granted how, and to whom.

1. CHARTER of pardon of mortmain, or the licence of mortmain, ought to accord in quantity of land, vill or value; for if variance be, and it be presented for the King, the King's serjeant shall maintain the presentment, and the King shall have a new fine, if it varies in quantity and in value; quod nota. Br. Variance, pl. 95. cites 22 Aff. 26.

2. The King and all the mesne lords may licence the tenant to give in frankalmoin, and reserve a tenure at this day; for the statute of quia emptores &c. was made only in advantage of lords, and therefore they may dispense with it; per Fitzh. Quære. Br. Licences, pl. 21. cites 40 E. 3. 27.

3. If the King grants to a corporation to purchase land the statute of mortmain notwithstanding, this is good against the King, tho' there are several mesnes between the tenant and the King. Br. Patents, pl. 40, cites 43 Aff. 19.

4. The King and the mesne lords may give licence to the tenant to alien in mortmain; for the statute was made in advantage of the lords, and they may dispense with it. Br. Mortmain, pl. 40. cites F. N. B. 211. per Fitzh. J.

5. The

5. The usage at this day is to have *clause* in his licence, when he aliens in mortmain, *that he may alien without suing any writ of ad quod damnum, viz. without any writ of ad quod damnum or any other writs or mandates thereupon to be had, made, or prosecuted &c.* Br. Ad quod Damnum, pl. 1. cites F. N. B. 222.

6. *And one and the same writ of ad. quod damnum shall serve for several purchases.* Ibid. F. N. B. 223. (G) S. P.

7. *And licence of one King shall serve to alien in the time of another King for mortmain.* Ibid. Br. Licences, pl. 22. cites S. C.—

F. N. B. 223. (G) S. P.—Co. Litt. 52. b. at the end.—Wats. Comp. Incumb. 8vo. 695. cap. 38.

8. There needeth not any *non-obstante* by the King of the *statutes of mortmain*; for the King shall not be intended to be misconusant of the law; and when he licensed expressly to alien to an abbot &c. which is in mortmain, he needs not make any *non-obstante* of the statute of mortmain; for it is apparent to be granted in mortmain, and the King is the head of the law, and therefore *præsumitur Rex habere omnia jura in scrinio pectoris sui* for the maintenance of his grant to be good according to the law. Co. Litt. 99. a.

(D. 2) Licence, or *Ad quod Damnum*. Necessary in what Cases.

1. IF a Man sue to the King for a licence to give an advowson to two chaplains, and to their successors to hold to their proper use, and that they may hold the same to them and their successors appropriate for ever to say divine service &c. he shall have a writ of *ad quod damnum* to inquire what damage such grant would be to the King or others, and that writ appeareth in the register. F. N. B. 223. (c)

2. The writ of *ad quod damnum* lieth where a man will give lands, or tenements in mortmain, as to a religious house, or to a body politic in fee-simple, then he ought for to have the King's licence, and the licence of the chief lords to make such gift or grant, and before such licence be granted; and the course is to sue unto the King to have a licence to sue that writ out of the chancery directed unto the escheator to inquire what damage it would be to the King, or unto other persons, if the King do grant such licence, and upon the return of that writ certified in the chancery, the King ought to give leave that he may alien or give in mortmain; and that *inquisition* ought to be certified into the chancery under the seals of escheator and of the jurors, by whom the inquisition was found. F. N. B. 221. (o) [490]

3. If the King will give licence to one *to grant a rent* unto an abbot and his successors, yet he ought for to sue forth a writ of ad quod damnum, if he have not these words in the patent, viz. and this without any writ of ad quod damnum &c. F. N. B. 223. (B)

S. P. for neither an abbot nor others, who have advowson can appropriate it to themselves, nor to others without licence. Br. Licences, pl. 23. cites F. N. B. 223. — So if i. be to exchange lands for rent. F. N. B. 224. (D)

4. And if a man will *exchange lands, tenements, or rents with another abbot, or body corporate*, upon the licence granted he ought to sue forth a writ of ad quod damnum. F. N. B. 223. (E)

But if he releases the rent, saving to himself the services, or if he releases to hold of him in frankalmcigne, it is not mortmain. F. N. B. 223. (I) in the notes there (a) cites 10 E. 3. 5. 21 E. 3. 18. Quære, 10 E. 3. Mortm. 17. 1 Bro. Mortm. 31. — For the former services are extinct, and nothing is reserved but that he holds of him and so he did before. Co. Litt. 99. a. — And this it seems without other licence. Wats. Comp. Incumb. 8vo. 695. cap. 38.

5. If an *abbot holdeth of another man by a certain rent-service*, the lord cannot release unto the abbot *that rent* without the King's licence; and if he do, it is mortmain and the King shall have the rent. F. N. B. 223. (I)

6. And if a man do purchase a licence *to found a house with lands, or to make a prebendary, and to give lands to the same* &c. he ought to have a writ of ad quod damnum upon the same. F. N. B. 224. (E)

7. If a man *devises lands or rents to his executors* and to their heirs, *to dispose* according to his will, and after he makes his will, that they give the same *in mortmain*; they ought to have the King's licence, and a writ of ad quod damnum upon the same as appears by the register. F. N. B. 224. (F)

And if the King seisset lands aliened in mortmain, and afterwards will give them again to the abbot &c. in

8. If a man will *give lands unto the King in fee, unto the intent that the King shall give them to a religious house*, yet a writ of ad quod damnum shall be directed to the escheator to inquire what damage that shall be to the King, or others, if the King should accept thereof, and give the same to the religious house. F. N. B. 226. (A)

fee, yet a writ of ad quod damnum shall be awarded, to inquire to whose damage it shall be &c. F. N. B. 226. (B) — And so if an abbot purchaseth lands without licence, and afterwards the King will pardon him for the purchase, and grant that he may retain and keep the lands, yet an ad quod damnum shall issue to inquire &c. F. N. B. 226. (B)

(D. 3) Writ of Ad quod Damnum. *How the Writ shall be.*

It appeareth by the several forms of writs of ad quod damnum which

1. **I**N the writ of ad quod damnum, *the substance of the licence to alien in mortmain ought to be expressed.* F. N. B. 223. (D)

are in the register, that the writ ought to be made according to the letters patent of licence

Because it ought to rehearse the effect of the letters patent therein; and therefore the forms of the writ of ad quod damnum do vary as the letters patent themselves do vary. F. N. B. 224. (C)

2. In the writ of ad quod damnum for *exchange* of lands, both the *lands* which are *given and* the lands which are *taken* in exchange ought to be *mentioned*. F. N. B. 223. (E)

(E) Pleadings.

[491]

1. **T**HE plaintiff in replevin shall not be suffered to disclaim against abbot, or other religious, nor against their bailiff, by reason of mortmain; per Afcough J. quod non contradicitur. Br. mortmain, pl. 2. cites 28 H. 6. 10.

2. If a man pleads entry for alienation in mortmain, he ought to shew that he entered within the year. Br. Pleadings, pl. 69. cites 3 H. 7. 2. The day of alienation in mortmain shall be

shewn certainly, so that it may appear if he entered within the year after the alienation according to the statute. Br. Mortmain, pl. 26. cites 7 H. 7. 5.—Br. Jours. pl. 49. cites S. C.—Br. Pleadings, pl. 80. cites S. C.

[See more of Mortmain in General at *Charitable Uses*, and other proper Titles.]

* Mortuary.

Some have said, that the King hath a mortuary after the decease of every archbishop and bishop, true it is, that the King after their deceases hath six things viz, (to use the words of the

(A) Mortuary. The efficient Cause.

[1. **†**THIS is *due de jure* to the parson in recompence of his personal tithes and offerings not duly paid in the life of the owner. Linwood fo. 12. Constitutiones Simonis Langham cap. de Consuetudine.]

records) 1. Optimum equum sive palfidum ipsius episcopi cum sella & freno. 2. Unam chlamydem sive clocam cum capella. 3. Unum ciphum cum coopertorio. 4. Unum pelvem cum lavatorio sive aquar'. 5. Unum annulum aureum. 6. Necnon mutam canum, quæ (saith the record) ad dominum regem ratione prerogativæ suæ spectant, & pertinent. And there is a special writ that issueth out of the Exchequer after the decease of the bishop for answering of the same; and in the records this is called, Multa Episcopi, or Multura Episcopi, derived a multa, for that it was a fine, or final satisfaction given to the King, that they might have power to make their last wills and testaments, and to have the probate of other mens testaments, and the granting of administrations; so as this duty which the King hath after the death of archbishops and bishops, is not any mortuary, 2 Inst. 491.—Mortuarium hath been sometimes used in a civil as well ecclesiastical sense, being payable to the lord of the fee; debentur domino manerii de Wreche-wike nominibus heriotti & mortuarii dux vaccæ pret. 12 sol. Jac. Law. Dict. Verbo Mortuarium cites Payoch, Antiq. 470.

† Spelm.

† Spelm. Gloss. verbo Mortuarium.—Lord Coke says, it is a gift left by a man at his death for recompence &c. 2 Inst. 491.

2 S. P. R.
Tic. Mortu-
ary, cites
S. C.

2. Mr. Selden tells us, that the *usage anciently was to bring the mortuary along with the corps* when it came to be buried, and to offer it to the church as a satisfaction for the supposed negligence and omission the defunct had been guilty of in not paying his personal tythes, and from thence it was called a corse-present. Wats. Comp. Incumb. 8vo. 1053. cap. 53. cites Selden Hist. of Tythes 287.

(A. 2) Statutes.

There is no 1. 13 Ed. **ENACTS** that a prohibition shall not lie for mortu-
mortuary 1. St. 4. **aries** in places where mortuaries used to be paid.
due by law,
but only by
custom, which is proved by the words of this act, viz. Ubi mortuarium dari consuevit. 2 Inst. 491.

[492] 2. 21 H. 8. cap 6. S. 2. Enacts that no spiritual person, his
Watf. bailiff or lessee, shall take or demand more for a mortuary than as
Comp. In- is hereafter expressed, nor shall convent any person before any ec-
cumb. 8vo. clestical judge for the recovery of more for the same than is here-
1040 cap. after declared, in pain to forfeit so much as he takes or demands
53. says, more, and likewise 40s. to the party grieved, to be recovered by
this law action of debt, wherein no essoign &c. shall be allowed.
was made to
the preju-
dice, rather

than to the advantage of the church, and at a time when divers other laws were made for lessening the power and interest of the clergy to the great abatement of that reverence which people had to the clergy and censures of the church—To the prejudice rather than the benefit of the clergy. Ibid. 1050. cap. 53.—Before this statute was made, if a doubt arose whether there was a custom in a place to have such things for a mortuary, this was merely triable in the Spiritual Courts by the statute of *articuli cleri*, which says that *where a suit is for a mortuary, prohibition shall not be granted*. Watf. Comp. Incumb. 8vo. 1050.—This act does not take away the jurisdiction of the Spiritual Court, unless it be suggested that the mortuary was of less value. 2 Keb. 867. Wood v. Jefferies.

A prohibition was moved for, because a vicar sued in the Spiritual Court for a mortuary upon a suggestion that it was not due to the vicar but to the impropriator, and that this statute of H. 8. takes away all mortuaries unless where custom allows them, because custom shall be tried by the common law and not in the Spiritual Court; but the Court would not grant prohibition; for they said, that the Spiritual Court shall hold plea of mortuaries notwithstanding this statute; because the statute only takes away such as were due by custom; and here it is admitted that it was due by custom, but differ as to the person to whom it shall be paid. Sid. 263. Trin. 17 Car. 2. B. R. Marke v. Gilbert.—A prohibition was moved for on denial of any custom for a mortuary and suggestion that such plea was refused: and it was granted nisi. 2 Keb. 835. Mich. 23 Car. 2. B. R.—But it being afterwards insisted that the settling the sum of money to be paid for a mortuary by this statute does not take away the jurisdiction of the Spiritual Court, the same was agreed to, per Cur. unless it be suggested that the mortuary was of less value, and the plea disallowed. The rule was discharged nisi. 2 Keb. 867 Hill. 23 & 24 Car. 2. Wood v. Jefferies.—Where the like suggestion was of there being no custom to pay a mortuary in the parish, the Court was for granting the prohibition (it being a doubtful point) to have it settled, and that the being of custom seem'd to be a notable ingredient in the case; and this statute provides that they shall demand no more than they had by custom, which tho' it be restrictive of their jurisdiction, yet shews that they have jurisdiction of mortuaries. But the other side offering affidavits of uninterrupted possession, Holt Ch. J. said, that might be something; for tho' there was a good suggestion made, yet, if it appeared to them to be merely for delay, they would not grant a prohibition, and that that was the reason of requiring affidavits of the truth of the suggestion. 12 Mod. 326. Mich. 11. W. 3. Oldham v. Rightson.—The plaintiff died before any trial had. Lutw. 1066. Pasch. 13. W. 3. S. C. by name of Johnson v. Wrightson.

S. 3. Name

S. 3. *None shall take or demand for a mortuary any thing at all where (by the custom) they have not been usually paid.* It was suggested that by this statute no mortuary shall be paid but in such places where it ought to be paid before the making the statute, yet he was drawn into the *Spiritual Court*; and a prohibition was granted. Cro. E. 151. Mich. 31 & 32 Eliz. B. R. *White's Case*.—And it was said to have been so adjudged in 16 Eliz.

S. 4. *Nor upon the death of a woman covert, a child, a person not keeping house, a wayfaring man, one not residing in the place where he happens to die, nor where the goods of the dead person (debts deducted) amount not to the value of 10 marks; nor above the sum of 3s. 4d. when they exceed not 30l. nor above 6s. 8d. when they exceed 30l. but not 40l. nor above 10s. when they amount to 40l. or above; and if the person die in a place where he or she dwelleth not, their mortuary shall be paid in the place where they had their most abode.*

S. 5. *This act shall not abridge spiritual persons to receive legacies bequeathed unto them or to the high altar.*

S. 6. *No mortuaries shall be paid in Wales, Calais or Berwick, or in any of their marches, save only in Wales and the marches thereof where they have been accustomed to be paid; and such as are there paid shall be regulated according to the order prescribed by this act.*

S. 7. *The bishop of Bangor, Landaff, St. David's and St. Asaph, and the * arch-deacon of Chester shall take mortuaries of the priests within their jurisdiction as hath been accustomed, notwithstanding this act.* *The bishop of Chester sued in the Consistory Court before the com-

missary for a mortuary after the death of J. S. a priest of the said diocese, surmising a custom to have the best horse or mare, saddle, bridle, spurs, best gown or cloak, best hat, best upper garment under his gown, his typpet, his best signet or ring, as to the bishop *de debito consuet. fore supponitur*. Whereupon a prohibition was moved for by reason of this statute, and averr'd that there is no such custom there, and that she had paid a mortuary to the parson of C. Jones and Whitlock J. held that a prohibition ought not to be granted, it being a suit for a mortuary, and they conceived that by this proviso mortuaries should be paid in the archdeaconry of Chester as before accustomed, and so out of the statute, and the custom for payment of mortuaries is triable in court christian. But Richardson and Croke J. held that no consultation ought to be granted; for the surmise in the prohibition is good, viz. That there is no such custom to have such goods for mortuaries as surmised, and that it may well be tried at common law; for now this statute appoints what shall be paid for mortuaries, and that in the said places in Wales and archdeaconry of Chester, such mortuaries shall be paid as have been accustomed, which is issuable and triable at common law, especially as this case is, where the plaintiff surmiseth that she paid a mortuary to the parson of C. in which parish the said priest inhabited; and that there is no such custom that she should pay it to the archdeacon. The defendant was ordered to plead or demur, and then the Court would give judgment upon the record before them. Cro. C. 237. Mich. 7 Car. B. R. *Hinde v. Bishop of Chester*. [493]

Less mortuaries already settled by custom shall not be increased by this act; and there also persons exempted by this act shall not hereafter be chargeable.

3. 12 Ann. Stat. 2. cap. 6. *Abolishes all customs of paying mortuaries upon the death of any clergyman within the dioceses of Bangor, Landaff, St. David's and St. Asaph, and enacts that no mortuary or corse-present or sum of money in lieu or name thereof shall be payable to any bishop of the said diocese or other person claiming under them, and gives recompence to the bishops of those sees in lieu thereof.*

See (A. 2)
pl. 2. S. 3-4

(B) *In what Cases it ought to be paid.*

Spelm. Gloss.
Verbo Mortu-
arium.

[1.] **I**F he who dies *has three animals* a mortuary ought to be paid, Linwood 7. Constitutiones de Simon Langham, cap. de Consuetudine & Linwood. fol. 110. Constitutiones de Robert Winchelsea.]

Spelm. Gloss.
Verbo Mortu-
arium.

[2. *But if he who dies has but 2 animals*, no mortuary shall be paid as is ordained by the constitutions of Simon Langham, cap. de Consuetudine in Linwood, fol. 7.]

See (A. 2)
pl. 2. S. 4. 7.

(C) *Who ought to pay it.*

[1.] **I**F a *feme covert* dies, no mortuary shall be paid. Linwood, fo. 7. This was ordained by the constitution of Simon Langham, cap. de Consuetudine.]

[2. *But if a feme survives her baron* and lives in the house by one year only, with the government of a family, and after dies, she shall pay a mortuary. Linwood. fo. 7. This was ordained by the constitution of Simon Langham.]

See (A. 2)
pl. 2. S. 7. &
pl. 3

(D) *To whom it shall be paid.*

[1.] **I**T ought to be paid *to the parson of the parish where the party who is deceased received the sacraments during his life.* This appears in Linwood. fo. 7. by the constitution of Simon Langham, and by the constitution of Robert Winchelsea. Linwood. fo. 110.]

[494]

(E) *How it ought to be paid.*

See (A. 2)
pl. 2. S. 4

Spelm. Gloss.
Verbo Mortu-
arium.

[1.] **I**F he who dies *has 3 animals*, the lord ought to have the best for a heriot, and the parson the 2d best for a mortuary. Linwood. fo. 7. Constitution of Simon Langham, cap. de Consuetudine. Linwood. fo. 110. Constitution.]

See (A. 2)
pl. 2. S. 2 &
in notis.

(F) *Remedy at Common Law, and how.*

1. **I**T has been held that such a right was vested in the parson to have the 2d best beast for a mortuary (where by custom it was due) that he might *seize it* wherever he could find it. Watl. Comp. Incumb. 8vo. 1053. cap. 53. cites 7 H. 6. 26. 16 H. 7. 5.

2 It is said by some, that since the statute of 21 H. 8. cap. 6. by which mortuaries are reduced to a certainty to be paid in money,

money, that an *action of debt* will lie upon the said statute in the Courts of Common Law for recovery of the sum due for a mortuary, tho' before that statute mortuaries were only recoverable in the Spiritual Courts; for tho' the statute may be only in the negative, yet it implies an affirmative that those rates set down in the statute may be taken where by custom mortuaries are due, so that the statute has made it a duty fix'd in the party, and then by consequence the law will give a proper remedy for the recovery of it, *Watf. Comp. Incumb. 8vo. 1053. cap. 53. cites Parson's Counsellor 359.* But says as he has never heard of any such action of debt brought, so he very much doubts whether such action is maintainable, and rather thinks it is not, but that it still remains as a matter suable only in the Spiritual Court, and refers to *5 Rep. de Jure Regis Ecclesiastico. 40.*

3. The Court was doubtful, whether a *prohibition* would lie for a mortuary, and therefore for settling this point they advised the defendant to accept of a declaration upon the prohibition, and thereupon to demur that the matter might be solemnly debated. *Carth. 97. Mich. 1 W. & M. B. R. Broad v. Piper.*

3 Mod. 268.
S. C. by
name of
Proud v.
Piper.—
Per Cur.
There is no
colour for a
prohibition

Since you have *not pleaded* a custom; for a mortuary is a thing within their jurisdiction, and if there were any room for a prohibition, it would be for want of a custom; and then that ought to have been pleaded: and he compared it with a *modus decimandi*, for which there is no remedy but in the Spiritual Court; and the case in *Cro. Car. Lind v. Bishop of Chester*, is not like this; for the statute excepts a mortuary, and a mortuary is a *meer ecclesiastical right*, for which there is no remedy but in the Spiritual Court; and rule for prohibition was discharged. *12 Mod. 416. Mich. 12 W. 3. Johnson v. Ryson.*

[For more of Mortuary in General, see Motion (D) pl. 1.
and other proper Titles.]

* Motion.

[495]

* A motion
is a prayer
or request
ore tenus of
the party
to the Court,
either in
person or by
counsel. P.
R. C. 245.

(A) Motion in Court. *What may be done upon Motion &c.*

1. ONE ought *not to move* the Court for a rule for a thing to be done which may by the common rules of practice of this Court be done without moving the Court for it; much less ought

For the
Court is not
to be trou-
bled, nor the
client put to

the charge
of needless
motions, nor
of motions
not to be

ought the Court to be moved for the doing of that which is
against the common rules and practice of the Court. 2 L. P. R.
209. cites 24 Car. B. R.

granted, and the former sort of these kinds of motions do favour of ignorance, and the latter
of too much presumption; the former are to put the Court to needless trouble, and the latter are
moved against the honour of the Court. 2 L. P. R. 209.

2. The Court was moved for an *attorney* of the Common
Pleas that was sued in this Court *to allow his writ of privilege*.
But Roll Chief Justice bid him plead his privilege, for we can-
not allow it upon a motion and his shewing of his writ of pri-
vilege. Sti. 373. Trin. 1653. B. R. Anon.

3. It was said by Roll Ch. J. If there be a *judgment against*
3, and one of them is taken in execution and be afterwards
set at large by the plaintiff's consent, if either of the other
two be afterwards taken in execution upon the same judg-
ment *he may have an audita querela*, but he cannot be relieved
upon a motion in Court, though grounded upon an affidavit.
Sti. 387. Mich. 1653. B. R. Price v. Goodrick.

4. The Court was informed that in an action of accompt
brought there was a verdict, that the defendant should *ac-*
compt before auditors, and that auditors were assigned, and the
parties were now before the auditors, and thereupon it was
moved upon the defendant's part, that this Court would
grant him time to accompt, for the reasons alleged. But
Wild answered, that it was not proper to move here; for the
auditors are now judges of the matter, and may give time if
they see cause. To which Glyn Ch. J. agreed, and said *the*
auditors are judges by the statute, and thereupon move before
them, and trouble not us with it. Sti. 464. Mich 1655.
B. R. . . . v. Le Gay.

5. A *statute lost* is not to be certify'd or help'd on motion,
but bill must be exhibited against all that are concerned in
the land; per Lord Keeper. Chan. Cases 276. Mich. 27 Car.
2. Anon.

12 Mod.
165. S. C.

6. Where *franchises* have been once *allowed on plea*, and
are on record in Court, there they may be allowed upon mo-
tion ever afterwards, but where they have not been allowed,
it is otherwise. Per Cur. 2 Salk. 450. Hill. 9 W. 3. B. R.
Hinton v. Hern.

7. The *merits of a cause* shall not be tried on a motion for
bail. In an action of debt upon a bond, the defendant says,
it was per duress; that will not excuse him from special
bail; for the Court will not determine the merits upon *such*
a motion, nor put a slur upon the plaintiff's cause, which
ought to come down fairly to trial without prejudice; so if he
says it was usurious. Per Holt Ch. J. Salk. 100. Hill. 11 W.
3. B. R. Anon.

8. Where a fine is set for *forcible entry*, conviction cannot
be quashed on motion, but the defendant must bring his writ
of

of error; but if no fine be set then it may be quashed on motion; per Cur. 2 Salk. 450. Pasch. 4 Ann. B. R. the Queen v. Layton.

9. After motion in arrest of judgment, no motion shall [496] be for a *new trial*, but *after* motion for a new trial, one may move in *arrest of judgment*. 2 Salk. 647. Turbervill v. Stamp.

10. The Court cannot *hold plea of an agreement* upon a motion. 1 Salk. 400. Mich. 10 W. 3. B. R. Anon.

11. *Scire facias* recited a judgment in *time of the King*, which in truth was in the *time of the King and Queen*; and so no judgment to warrant it; and judgment was upon return of *nibils*. Per Cur. in strictness we ought to put them to *audita querela*, but we generally relieve them *upon motion*; and the judgment on the *sci. fa.* was set aside, and ordered that the money levied by a *fi. fa.* thereupon should be *refunded*. 12 Mod. 351. Pasch. 12 W. 3. . . . v. Watts.

12. If any thing be moved to the Court *upon a record*, but *the record* upon which the motion is made *be not in Court* when the motion is made, the Court will make no rule upon such a motion. 2 L. P. R. 208. cites Hill. 22 Car. B. R. For the Court will be satisfied by the record, whether the matter of the record, upon which the motion is grounded, be so as is suggested by the counsel, and will not rest upon suggestions made at the bar; for the Court judges not upon *allegata* only, but upon *allegata & probata*. 2 L. P. R. 208.

13. One ought not to move the Court for *a thing against which they have delivered their opinions*. Trin. 22 Car. B. R. But ought to rest satisfied with the judgment of the Court, and to submit thereunto. 2 L. P. R. 208.

14. In the case of one Topleys v. Rag, Hill. 1657. B. S. It is said, that one ought not to move for *several things in one motion*; and therefore upon a motion, *that one in an ejectment might be made party to defend his title, and that he might also imparl* to the next term; the party was admitted to be made a party, and ordered to move again at another time for an imparlance. To move two things in one motion, the Court calls *grafting upon a motion*; but such motions have been oftentimes allowed. 2 L. P. R. 210.

15. Every person who makes a solemn argument at the bar, is allowed by the Court a *motion for his argument*. 2 L. P. R. 210.

16. Many motions are now made touching the *regular issuing forth, and execution of commissions, process, and other matters of course*, which heretofore were commonly referred to four of the six clerks not in the cause, who hearing the other two clerks concern'd in the cause did easily determine the question without delay or charge to the suit. P. R. C. 249.

17. It has been said, that there is seldom occasion for more than *one motion* in a cause, (*viz.*) *for an injunction for quitting possession, or staying suits at law*; other motions being for the most

most part needless, or not tending to end but perplex the cause; and a cause would be soon ready for hearing, if it went on in an orderly course by pleadings and proofs, without being crossed by frivolous motions. Wherefore the Solicitor ought to be very careful not to lead his client into needless and expensive motions. P. R. C. 249.

(B) *By whom* it may be made.

1. **T**HE clerk of the errors in the Common Pleas attended here upon a rule of this Court; whereupon *a clerk of the Court* gave notice of it to the Court, and prayed he might be heard. But the Court answered, that counsel ought to move, and not he. Sti. 135, Mich. 24 Car. B. R. Anon.
- [497] 2. It is against the course and practice of the Court for any person to make a motion *in his own cause*. 24 May Pasch. 1650. B. S. So said in case of one Truston v. Mason, viz. For a counsellor to do it. 2 L. P. R. 209.

(C) Time. *At what Time a Motion may be made for what.*

1. **M**onday is a special day for motions in this Court by the ancient course. I suppose it is so, because the Court and Counsel cannot be so well prepared to speak in solemn matters on that day, in regard of the Lord's day, which immediately precedes. Mich. 22 Car. B. R. Yet motions are made *upon any day, as the business of the Court, or the day will permit*. 2 L. P. R. 208.

2. Where a motion hath been *denied*, the same matter *ought not to be moved again* by another counsel without acquainting the Court thereof, and having their leave for the same. 2 L. P. R. 208.

3. It is not usual to move *for a trial at the bar upon the last day of the term*. 2 July, 1650. B. S. Nor for the secondary to *make a report, nor for a prohibition, nor to vacate a judgment*, nor such like cases or dispute, except both parties be in Court, and are contented with the motion, and prepared to speak in it; and if such motions be made, the Court will make no rule upon them. 2 L. P. R. 210.

Because the other party cannot have time to make his defence by an-

4. It is against the rule and practice of this Court, to move *for an attachment or any matters in law upon the last day of any term, except it be where the case is peremptory, or of necessity to be moved then*. 2 L. P. R. 210. cites Pasch. 23 Car. B. R. answering the motion; and that day is a day appointed chiefly for motions, to prepare business against the assizes, or the term next to come. 2 L. P. R. 210.

5. The

5. The *three last days* of the term, if it be an *issuable term*, are appointed to hear motions, and no other business but motions and Crown-Office causes, except upon special occasions; *But if it be not an issuable term, then the two last days* are only for the hearing of motions; for in those terms there is less occasion for motions, than in issuable terms. 2 L. P. R. 210. cites 30 January 1650 B. S.

6. By Glynn Ch. J. It is not the custom or the practice of C. B. for a serjeant at law to move for a clerk of the Court, and afterwards for his client. 2 L. P. R. 210. cites Mich. 1655. B. S. For it seems it is not intended there, that he doth

move without a fee for the clerk of the Court, and therefore if he should be so heard, he would have a double motion at one time, which no Court doth allow; but in this Court it is usually done, so that it seems the counsel here are more civil to the clerks of the Courts, than they are in the Common Pleas. 2 L. P. R. 210.

7. During the term every *Thursday* is a day for sealing and motions only, except it happens to be the *second day of the beginning*, or the *last day save one of the end of the term*. And so are *Tuesdays* and *Saturdays*. So the *first and last days of the term* are also seal days, and days of motion. P. R. C. 248.

8. In vacation, seal days are only days of motion, and are appointed by the Lord Chancellor. Yet the morning after the term motions are always made at the Rolls, upon supposal (I guess) that some may probably remain, which should have been moved, but could not the last day of the term, P. R. C. 248.

9. No motions are heard after the last general seal after term, till the first general seal before the ensuing term; but things which require dispatch may be petitioned for, and right will be done; for this Court is always open. P. R. C. 249. [498]

10. A plaintiff in error cannot move to quash his writ of error before error assigned. 12 Mod. 602. Mich. 13 W. 3. Anon.

(D) Quashed on Motion. What.

See Indictment (S. 2)

1. **S**UIT was in the Spiritual Court for a mortuary and a prohibition was granted, and in debating thereof, a question was, whether consultation should be granted upon a motion without answering to the prohibition. And it was argu'd by Noy, that it should, because the suit being for a mortuary, there is no cause of prohibition, and therefore consultation should be granted; and of that opinion was Jones and Whitlock J. But Richardson and Croke J. held, that as this case is, no consultation ought to be granted without answering to the prohibition, the plaintiff having shewn in her declaration upon the prohibition, that the defendant had sued her after the prohibition, which is a contempt, and ought to be answered; but, perhaps in some cases where the prohibition appears in it self to be unduly granted, the defendant before appearance having committed no contempt in prosecuting thereof, may move to have a

consultation. Cro. C. 237. Mich. 7 Car. B. R. Hinde v. the Bishop of Chester.

2. The Court was moved *for a supercedeas* for the Earl Rivers, who was arrested by a bill of Middlesex, and is in custody of the Marshal of this Court, because he is a *peer of the realm*, and ought not to be arrested. The Court answered, you must plead your *privilege* if it be so; for we cannot take notice of it upon a motion. Sti. 177. Mich. 1649. B. R. Anon.

3. *Indictment for selling bread under the Assise* was denied to be quash'd upon motion, because oppressive of the poor. 12 Mod. 242. Mich. 10 W. 3. the King v. Flint.

4. *Indictment for a cheat* denied to be quashed on motion. 12 Mod. 499. Pasch. 13 W. 3. the King v. Orbeville.

(E) Done. *What must be done, or will be required, in order to obtain what is moved for.*

* S. P. that the Court may be informed upon what grounds the rule was made, and whether there be cause shewn upon the motion sufficient to induce them to set aside the rule. 2 L. P. R. 203. cites 22 Feb. 1649. B. R.

1. IF there be *divers rules* of the Court made in a cause, and the party intends to move upon these rules, he *must produce the rule* that was *last made* in the cause, and move upon that. Pasch. 23 Car. B. R. Yet it is *necessary also to have the rules and copies of the * affidavits made in the cause*, to satisfy the Court how the cause stands in Court, and how it hath been proceeded in from time to time, and how the rules depend upon one another; but the last rule is the most material. 2. L. P. R. 209.

2. One party ought not to surprize another by a motion in Court, but he ought to *move in such convenient time*, that the other party against whom the motion is made may have time to be heard, and to make his defence. And this the Court will grant. 2 L. P. R. 209. cites Pasch. 23 Car. B. R.

[499]

(F) Done *without Motion* what.

1. BY Roll Ch. J. *a matter entered upon record cannot be altered without a motion made*, and the consent of the Court first obtained, tho' the attornies on both sides consent to it. Sti. 386. Trin. 1653. B. R. Anon.

2. If *rescous* be returned, *attachment* shall go of course without motion; per Cur. 12 Mod. 247. Mich. 10 W. 3. Anon.

(G) Notice. *In what Cases it must be given, and at what Time.*

1. WHEN a *thing questionable* between the parties is to be moved to the Court for settling thereof; he that intends

tends to move it, must give the adverse party * *timely notice of the day* (as near as he can) when he will move it; Mich. 1650. B. S. and upon what he intends to move, that he may be prepared to answer the motion at the time when he moves, for the quicker dispatch of business, and for the saving further charges. 2 L. P. R. 209.

* Every notice of motion must be given two days at least before the day on which it is to be made;

as if the motion is to be on Thursday, the notice must at least be on Tuesday. P. R. C. 247.

2. Some motions are *of course* (that is) where by a standing rule, or the known course of the Court, a thing desired is to be granted without hearing the other party; in these there needs no notice of the motion to the other side, nor ought council to oppose them. P. R. C. 245, 246.

3. There are others would be of course upon *supposition of the facts standing single*; but because there may probably be some other fact or circumstance resting in the knowledge of the parties, and which the Court cannot at present see, which yet oppugns the reason of the motion, they are *granted only nisi* &c. *if there be not notice* of the motion, or if there be, yet all are not absolutely granted. P. R. C. 246.

4. There are others *not founded on such general rule or usage*, and sometimes besides or against it, which are *granted or denied*, as the Court sees fit, *upon the weight and reason of the matters*, as it appears upon the motion, or *upon hearing of both sides*. P. R. C. 246.

5. Some of these *of small moment and frequent* are generally granted without notice; if less frequent, and of more weight, then only *nisi*, if no notice. P. R. C. 246.

6. Such of them as are *very rare, and upon extraordinary occasions*, will seldom be granted in any sort without notice. P. R. C. 246.

7. Before you move, *affidavit* must be made of the service, and the manner of it, and the affidavit *filed*, and a copy taken thereof, if you think you shall need to prove notice. P. R. C. 247.

8. Where notice is necessary, *every thing* the party moves for *should be expressed*; for the Court will not ordinarily extend the order beyond the notice. P. R. C. 247.

As where notice was, that the Court would be moved,

That the plaintiff might be put into possession, and a receiver appointed; the Court would not order that nothing should be received by the defendant in the mean time, though the defendant did not defend the motion. P. R. C. 247.—So, notice was given of a motion to *superseide an excommunicate capiendo*, because the bishop's seal was not to the *significavit*; which upon the motion happening otherwise, the council would have insisted, that the excommunication was before the last general pardon; but the Court would not hear them to that, till another day; because there was no notice given of the exception, which there ought to have been, though there needed none of the other, which any one, as *Amicus Curiae*, might have shewn had it been true. P. R. C. 247, 248.

9. It was said that if a party gives notice 3 times that he will [500] move a matter, and yet does it not he shall ordinarily pay the other 10s. costs: But if it be a matter of weight, and many counsel

Motion. Murder or Manslaughter.

counsel are feed, the Court will order costs *to be taxed* by a master. P. R. C. 248.

10. Upon motion *to estreat a recognizance*, the other side ought to have notice. 12 Mod. 494. Pasch. 13 W. 3. Anon.

(H) Notice. To whom it must be given, and How.

1. **N**OTICE of a motion, must be given *in writing signed* with the name of the party, his clerk, or solicitor that gives it. It must be delivered *to the other party, or his solicitor*, (or at least left at one of their houses, tho' I have heard it said, that this is not ordinarily good service;) *or which is more usual, it must be delivered to the clerk in Court, or left at his seat* in the office with his clerk or servant. P. R. C. 246, 247.

2. Notice of motion *to take money out of Court*, must be to the party himself, except the Court upon a previous motion have ordered so many days notice to the clerk in Court &c. as may be time enough to send the client notice, and to have his answer if he be in the kingdom; but hard to be found, or the like, shall be sufficient. P. R. C. 248.

3. Where by reason of the *absence of a counsel*, who should have defended a motion, the Court thinks fit to *put it off* for that time, the *former notice is often ordered to be continued*; so as the matter may be moved another day upon *notice to such absent counsel only*. P. R. C. 249.

[For more of Motion in general, see Indictment, (S. 2) *de exas Regno*, and other proper Titles.]

Murder or Manslaughter.**(A) What is, and of the ancient Punishment thereof.**

1. **M**URDER is when a man of *sound memory*, and of the *age of discretion*, unlawfully killeth within any county of the realm any reasonable creature in *rerum natura* under the King's peace with malice fore-thought either expressed by the party, or implied by law, so as the party wounded, or hurt &c.

&c. die of the wound, or hurt &c. within a year and a day after the same. 3 Inst. 47.

2. The English and German laws for *punishing* murder and manslaughter by *pecuniary mulcts* were alike, except only that they differed in the sums or penalties imposed. In some of the German laws the killing of a man is called *mordritum*, in others *mordrido* or *mortando*, but in the German-Saxon laws Tit. 2. S. 6. it is called *mordrum*, which word, nor any thing like it is to be found in our English-Saxon laws, tho' it occurs often in William the Conqueror's laws, and the laws of H. 1. The word is from the German *ermorden*, or *morden* to * kill a man basely as thieves use to do; *Si quis hominem occiderit & absconderit, quod mordritum vocant*; the *mulct* commonly for the death of a man was his *weregild*, viz. *the value of his head or life*, out of which, if he were a servant, his *master or patron* had a part, or compensation for his loss, which was called *manbote*. Brady's Comp. Hist. of England 62. (D) (E) (F). cites as above and LL. Inæ. cap. 69. LL. Fris. tit. 1. S. 3. 6. 9. 10.— And ibid. 119. in anno Domini 924. says that King Athelstan by a law established the *price* of murder or man-killing *from the King to the peasant*, the punishment whereof was at that time pecuniary, and not capital or by death; and there sets down the several prices or valuations.

* Hawk. Pl. C. 78. cap. 31. S. 1. says that the word murder anciently signified only the private killing a man for which by force of a law introduced by K. Canutus for the prefer-

that the person slain were an Englishman, (which proof was called Engleshire) or could produce the offender &c. and in those days, the open willful killing of a man through anger or malice &c. was not called murder, but voluntary homicide. Hawk. Pl. C. 78. cap. 31. S. 1.—But the said law concerning Engleshire having been abolished by 14 Edw. 3. 4. the killing of any Englishman, or Foreigner through malice prepense, whether committed openly or secretly, was by degrees called murder; and 13 Ric. 2. 1. which restrains the King's pardon in certain cases, does in the preamble, under the general name of murder, include all such homicide as shall not be pardoned without special words; and in the body of the act expresses the same by murder, or killing by await, assault or malice prepensed. And doubtless the makers of 23 H. 8. cap. 1. which excluded all wilful murder of malice prepense from the benefit of the clergy, intended to include open, as well as private homicide within the word murder. Ibid. S. 2.—By murder therefore at this day we understand, the willful killing of any subject whatsoever, through malice fore-thought, whether the person slain, be an Englishman or foreigner. Ibid. S. 3.—This distinction between murder and manslaughter only, is occasioned by the statute of 23 H. 8. and other statutes that took away the benefit of clergy from murder committed by malice prepensed, which statutes have been the occasion of many nice speculations. The word murder is known to be a term, or a description of homicide committed in the worst manner, which is no where used but in this island, and is a word framed by our Saxon ancestors in the reign of Canutus upon a particular occasion; per Holt Ch. J. Kelyng. 121. Hill. 5 Annæ. B. R. in Case of the Queen v. Mawgridge.

Homicide against the life of another, amounting to felony, is either *with or without malice*. Hawk. Pl. C. Abr. 82. cap. 30.—That *without malice*, is generally called *manslaughter*, which is such a killing as happens either *on a sudden quarrel*, or in the *commission of an unlawful act*, without any premeditation or deliberate intent of doing mischief; and therefore there can be no accessories in it. Hawk. Pl. C. Abr. 83. cap. 30. S. 1.

3. 52 H. 3. cap. 25. Murder from henceforth shall not be judged before our justices where it is found misfortune only; but it shall take place in such as are slain by felony, and not otherwise.

The mischief before this statute was, that he that kill'd a

man by misadventure per infortunium, as by doing any act that was not against law, and yet against his intent, the death of a man ensued, this was adjudged murder; as if a man had cast a stone over an house, or shot at a mark, and by the fall of the stone, or glance of the arrow a man was slain, the party should suffer death; and so it was at the common law, if a man had killed a man se defendendo, he should be hanged and forfeit in both cases, as in case of murder; so tender a regard had

the law to the preservation of the life of man. And with the common law was agreeable the judicial law; before the cites of refuge were appointed, he that killed a man by misadventure &c. was put to death, to the end that men should be so provident and wary of their actions, as no death of, man, woman or child might ensue thereupon. 2 Inst. 148.

This statute doth remedy both points; for the later cause is general, that it shall not be murder but where it is done per feloniam is *felice animo*, and by malice prepensed; and albeit his life in neither of these cases is now lost, yet the forfeiture of his goods and chattels remain'd in both cases; and so if a man kill a man by misadventure, if he escape, the town shall be amerced &c. which is also a mark of the common law. 2 Inst. 149.

Holt Ch. J. says a mistake upon the statute of Marlebridge may be rectify'd; for it was not made upon a supposition that he, that killed the person slain by misfortune, should be hang'd, but only to explain, or rather to take off the rigor of the Conqueror's law, that the country should not be compelled to find out the manslayer, or if he were found out, he should not undergo the penalty of that law; for as the law stood, or was interpreted before that statute, if a man was found to be slain it was always intended. 1. That he was a French man. 2d. That he was killed by an Englishman. 3d. That killing was murder. 4. If any one was apprehended to be the murderer, he was to be tryed by fire and water, tho' he killed him by misfortune, which extended beyond reason and justice in favour of the Normans. But if an Englishman was killed by misfortune, he that killed him was not in danger of death, because it was not felony; for saith Bracton (who wrote the latter end of H. 3.) fo. 136. he that killed a man by misfortune was to be discharged. 5. If the malefactor was not taken then the county was amerced; but by the statute of Marlebridge if it was known that the person slain was a Frenchman and was killed by misfortune, then the country should not be amerced if the manslayer was not taken, or if he were taken he should not be put to his ordeal trial; this seems to be the true meaning of the statute; but secondly it will appear to a demonstration, that before the statute he that killed an Englishman per infortunium was never in danger of any death; for this statute of Marlebridge was made 52 H. 3. the statute of Magna Charta was consummate 9 H. 3. and that directs, that every one imprisoned for the death of a man and not thereof indicted might of right perdue the writ de Odio et Atia; and if it was found that the person imprisoned killed him *se defendendo*, or per infortunium, and not per feloniam, then he was to be bailed, which shews that he was not in danger of death; for if he had, he would not have been let to bail. Kelyng. 122, 123. Hill. 5. Annæ B. R. in case of the Queen v. Mawgridge.—cites 2 Inst. 24.

[It seems this word (Feme) does not intend a wife, as Mr. Nelson translates it, for that would be petty treason, if any thing.]

4. A man and his feme having long time lived incontinent together, the man having consumed his substance and growing into necessity said, that he was weary of his life, and that he would kill himself, and the feme said that then she would also die with him; whereupon the man prayed the feme to buy *ratsbane* and they would drink it together, which she did, and put it into the drink and they drank it, but afterwards she took *fallad oyle* and so vomited and recovered, but the man died. And the question was if this was murder in the feme; Montague the recorder caused the special matter to be found; quære the resolution. Mo. 754. pl. 1041.

S. C. cited by Jones J. by the name of Levett's case, but it is reported there that the servant going to the door to let out the chare-woman, thought she heard thieves trying to break in, upon

5. Lovell had two maid-servants, and one of them without his knowledge, had received into the house a chare-woman, who (all being in their beds) by her negligence let a thief into the house, and afterwards called out thieves, thieves; and afterwards Lovell came out of his bed with a sword in his hand, and the chare-woman calling to mind that she was there without his privity or his wife's hid herself behind the dresser, and Lovell's wife espying her there cried out thieves, thieves, upon which Lovell came and ran her into the breast with his sword; and the opinion of the justices at the Old-Baily, and also of all the justices of the King's Bench was, that it was neither murder nor manslaughter; not murder, because there was no fore-thought malice; nor manslaughter, because he supposed her to be a

thief; and if she had been a thief, then it was clear that it was not manslaughter. Mar. 5. Pasch. 15 Car. cites Lovell's Case. which she ran to her master and mistress, and told them of it, but put the woman into the buttery, where the wife espying her, and not knowing her, cry'd out to her husband, who went in and being in the dark thrust his sword before him and kill'd the woman; and that the Chief Justice and himself and the Recorder resolv'd, that it was not manslaughter; for it was done ignorantly without intention of hurt to the woman. Cro. C. 588.

6. *Barbarity* will make malice in many cases: per Holt Ch. J. Comb. 408. cites Cro. C. 131. Holloway's Case. *A boy climb'd a tree in a park to cut boughs and*

the woodward seeing him bid him to come down which the boy did, and then the woodward ty'd him with a rope about his waist to the horse's tail and struck both the boy and the horse, by means whereof his shoulder was broke and he died immediately; this was held to be murder, tho' the woodward had no intention to kill the boy; but being killed, without making any resistance, by one who had no authority to correct him in that manner, and tho' the cutting the boughs was an unlawful act, yet the law in such case implies malice prepense. 5 Mod. 290. Arg. cites Holloway's case. S. C. Palm. 545. Mich. 4 Car. B. R. adjudged murder, but says the Court did not declare their reasons openly. Jo. 198. S. C. adjudged, and says that all the four justices and all the barons of the Exchequer were of opinion that it was murder. Cro. C. 131. S. C. by name of Holloway's case adjudged, and says that the opinion of all the barons (except Hutton who doubted) was that it was murder and that all the justices delivered the reasons of their opinions; and Holloway was hanged. 9. P. tho' it cannot reasonably be thought that he designed more than the chastisement of the boy; and the horse running away in that manner was a surprise to Holloway; yet in regard the boy did not resist him, his tying him to the horse-tail was an act of cruelty, the event whereof proving so fatal, it was adjudged to be malice prepensed, tho' of a sudden and in the heat of passion. Kelyng. 127, 128. Hill 5 Annæ cites S. C. Ibid. 132. S. C. cited by Holt Ch. J. who says, that if one man be trespassing upon another, breaking his hedges or the like, and the owner, or his servant shall upon sight thereof take up an hedge stake and knock him on the head, that will be murder; because it was a violent act, beyond the proportion of the provocation.

So if a man sees another stealing his wood, he cannot justify beating him, unless it be to hinder him from stealing any more (that is) that notwithstanding he be forbid to take any, he doth proceed to take more, and will not part with that which he had taken; but if he desists, and the owner or woodward pursues him to beat him, so as to kill him, it is murder; per Holt Ch. J. Kelyng. 132. Hill. 5 Annæ. in case of the Queen v. Mawgridge. So if a man goes violently to take another man's goods, he may beat him off to rescue his goods. 9 E. 4. 281. b. 19 H. 6. 31. but if a man hath done a trespass, and is not continuing in it, and he that hath received the injury shall thereupon beat him to a degree of killing, it is murder; for it is apparent malice; for in that case he ought not to strike him, but is a trespassor in so doing. Ibid. per Holt Ch. J. S. C. cited Hawk. Pl. C. 83. cap. 31. S. 39. and says, it seems, that he who upon a sudden provocation executes his revenge in such a cruel manner as shews a cruel and deliberate intent to do mischief, is guilty of murder, if death ensue.

7. Not only he who by a wound or blow, or by poisoning, strangling, or famishing &c. directly causes another's death, but also in many cases, he who wilfully and deliberately doing [503] a thing which apparently endangers another's life, thereby occasions his death, shall be adjudged to kill him. Hawk. Pl. C. 78. cap. 31. S. 4.

8. And such was the case of him who carried his sick father, against his will, in a cold frosty season, from one town to another, by reason whereof he died. Hawk. Pl. C. 78. cap. 31. S. 5.

9. Such also was the case of the barlot, who being delivered of a child, left it in an orchard covered only with leaves, in which condition it was struck by a kite, and died thereof. Hawk. Pl. C. 79. cap. 31. S. 6

(B) Of what Persons it may be.

1. **A** Man was *outlawed of felony*, and *J. N. killed him*, and he was arraigned of it, notwithstanding the deceased was outlawed of felony at the time &c. Br. Corone, pl. 67. cites 2 Aff. 3.

The causing
an abortion
by giving a
potion to, or
striking a

2. If a man *kills an infant in ventre sa mere*, this is not felony; because he shall not be * named a person slain, nor was he in rerum natura, Br. Corone. pl. 91. cites † 27 Aff. 55.

woman big with child was murder; but at this day it is said to be a *great misprison only*, and not murder unless the child be born alive and dies thereof, in which case it seems clearly to be murder notwithstanding some opinions to the contrary; and in this case the Common Law seems agreeable to the Mosaicall. Hawk. Pl. C. 80. cap. 31. S. 16.—3 Inst. 50. cap. 7.—* Orig. (Nominatur Occisus.)—† It should be 22 Aff. 94.

S. P. and
where judgment
is to be
hanged, and
the officer
cuts off his
head this is
felony. Br.
Appeal, pl.
5. cites S. C.—

3. If a man be *adjudged to death* it is not lawful for any in pain of * felony to kill him, unless it be the officer by way of execution, and that the marshal, sheriff, &c. who does the execution may justify, but the justice who judges him cannot justify but plead not guilty. Br. Corone. pl. 7. cites 35 H. 6. 58.

* S. P. that the killing of him is felony. Br. Corone. pl. 196. cites 24 H. 8. per omnes in Domo Parliamenti.—Of whatsoever crime he is attainted, the killing him is murder. Hawk. Pl. C. 80. cap. 31. S. 5.

But if a man *kills one who is attainted by præmunire*, this is not felony; for he is out of the King's protection, which is the same as if he was out of the realm and power of the King. Br. Corone. pl. 196. cites 24 H. 8. per omnes in Domo Parliamenti.

Hawk. Pl.
C. 80. cap.
31. S. 15.

4. The malicious killing of any person of *whatsoever nation or religion*, Jew, Heathen, Turk, or other Infidel being under the King's peace, is murder. 3 Inst. 50. cap. 7.

(C) By what Persons it may be.

A woman
that was
mad kill'd her
husband, and

1. **H**E who *kills a man* when he is mad shall remain in prison. Br. Corone. pl. 101. cites 26 Aff. 27.

forfeited nothing; for the intent makes the felony; and a person that is mad has neither wit nor intention. But note for another reason she cannot forfeit any thing; for a *feme covert* has no goods, and see also that it is not felony in a person that is mad. Br. Corone. pl. 169. cites 12 H. 3. Fuzh. Forfeiture 33.—If a *lunatick* kills a man, it is not felony; because felony must be done animo felonico. Hob. 134. in case of Weaver v. Ward.

2. So of him who *cannot hear nor speak*. Ibid,

It was
said, that by
the ancient
law, none
were hanged

3. If an *infant murders an infant*, which is found accordingly, he shall go quit; Quod Nota Bene. Br. Corone. pl. 61. cites 3 H. 7. 1. & 21 H. 7. 31.

[504] within age, nor suffered judgment of life or of members; but before Spurguel it was found, that an *infant* within age *killed his companion*, and after † *hid him*, and therefore he caused him to be hanged immediately; for by the hiding he could discern good and ill; Quia *malit a supplet ætatem*. Br. Corone. pl. 74. cites 12 Aff. 30.—* Orig. (demanded) but in the Year Book it is as here.—† Original is (moucha) and the word (mouch) in the West of England signifies when a boy plays truant or absents himself from school.

So where an infant of nine years of age killed another infant of nine years, and confess'd the act, and it was found that after the act he had hid him, and excused the blood upon his cloaths by bleeding of his nose, it was held that he should be hanged, and this for example of others. But per Fortescue, infant or a man who has no discretion shall not be hanged. Br. Corone, pl. 132. cites 3 H. 7. 1.

So where an infant between 10 and 12 years of age was indicted of the death of another infant, and was appoied, who said that he kept sheep with the other and they differed, by which he struck the other in the throat, and after in the head, and in the body to death, and draw'd the body into the corn, and the justices respited judgment for the tender age, and because they had not the matter fully, and several justices said that he was worthy of death. Br. Corone, pl. 135. cites 3 H. 7. 12.

(D) Of Officers, and Pleadings.

1. **I**F any sheriff, under-sheriff, serjeant or officer, who hath execution of process, be slain in doing his duty, it is murder in him who kills him, although there was not any former malice betwixt them; for the executing of process is the life of the law, and therefore he who kills him shall lose his life; for that offence is contra potestatem regis & legis; and therefore in such case there needs not any inquiry of malice. Resolved, nullo contradicente. Cro. J. 280. Pasch. 9 Jac. B. R. John Mackaley's Case.

S. P. 4 Rep. 40. b. Trin. 28 Eliz. Young's case. S. C. cited 1 Kel. 66. in Thomson's case. But it is necessary to make it murder,

that such officer tell him that he does arrest him; for else, if he says nothing, but falls upon the man and be killed by him, this is but manslaughter, unless it appears that the person arrested did know him to be a serjeant &c. and that he came to arrest him; for as the case is there put, if one seeing the sheriff or a serjeant whom he knows has a warrant to arrest him, and to prevent it before the officer come so near as to let him know he does arrest him, he shoots at him and kills him, this is murder. Kel. 66, 67. cites Mackaley's case.

2. The law is the same if any justices of peace, constable, or any other officer, or any who comes with them in their assistance for the preservation of the peace, be slain in executing their office, it is murder. Ibid.

S. P. Kel. 66. cites S. C. S. P. though the murderer did not

know the party who was killed, and though the affray was sudden; because the constable and his assistants came by authority of the law to keep the peace, and to prevent the danger which might ensue by the breaking of it, and therefore the law will adjudge it murder, and that the murderer had malice prepense, because he opposed himself against the justice of the realm. 4 Rep. 40. b. Trin. 28. Eliz. Young's case.

But per Holt Ch. J. if a sudden quarrel happens between several persons whereby the peace is broke, and a constable comes to part them, and they continue on for a time and will not obey the constable, and the constable is killed in the fray, yet if they did not know that he was a constable, and that he came to keep the peace, so that they might take notice of his coming, it will be but manslaughter in him that kills him, and no offence in the rest. 12 Mod. 631. Hill. 13 W. 3. in case of the King v. Plummer.

3. So if a watchman be killed in staying night-walkers, it is murder. Cro. J. 280. Pasch. 9 Jac. B. R. in John Mackaley's Case.

S. P. Kel. 66. cites S. C. S. P. 4 Rep. 40. b. Young's case.

4. They resolved also, that if there were error in awarding of process, or in the mistake of one process for another, and an officer be slain in the execution thereof, the offender shall not have

the

the advantage of such error, no more than a sheriff who suffers a prisoner to escape, shall take advantage of any error thereby: but the resisting of an officer when he comes to make an arrest in the King's name is murder. Ibid.

[505] 5. When an officer is slain, as the case abovementioned, there needs not a special indictment upon all the matter to be drawn, as in this case was done, but a general indictment, that such a party *ex malitia sua præcogitata percussit &c.* and although there be not proof made of any in any precedent malice, yet the indictment is good; for the law presumes malice. Wherefore judgment was given accordingly, and Mackaley was executed. Ibid.

6. J. S. a bailiff having a warrant to arrest A. and in coming towards him A. drew his sword, and J. S. making towards him without using any words of arrest, A. said, *stand off, come not near me, I know you well enough, come at your peril;* and J. S. taking hold of him, he thrust him with his sword, that he died immediately; it was held by all the Court that it was murder; for he coming as an officer to arrest, and not offering any other violence or provocation, although he used not the words *I arrest you or shewed him any warrant*, because peradventure he had not time, nor was demanded the cause, the law presumes it to be malice and murder in him that so kills one being an officer and coming to execute process. Cro. Car. 183. Pasch. 6 Car. B. R. Thomas Petre's Case.

Jo. 346. S.
C. the King
v. Sir Henry
Ferrers.

7. A. was arrested for debt, and N. his servant, in seeking to rescue him as was pretended, killed S. the bailiff; but because the warrant to arrest him was by the name of Henry Ferrers, knight, and he never was a knight, it was held by all the Court, that it was a variance in an essential part of the name, and they had no authority by that warrant to arrest Sir Henry Ferrers, baronet; so it is an ill warrant, and the killing of an officer in executing that warrant cannot be murder, because no good warrant. But upon the evidence it appeared clearly, that Sir Henry Ferrers upon the arrest obeyed, and was put into an house before the fighting betwixt the officer and his servant; wherefore he was found not guilty of the murder and manslaughter. Per omnes J. Cro. Car. 372. Trin. 10 Car. B. R. Sir Henry Ferrers's Case.

Cro. C. 537
to 539. S. C.
and says,
that after
argument at
the bar, all
the justices
seriatim de-
livered their
opinions,
that it was
not murder.
But they all
held that it
was man-

8. The sheriff granted his warrant on a *Ca. Sa. against C. and D. to M. and others*, who in the night hid themselves near D's house, and in the morning came to the house, which was shut and locked, and said that they had process against C. and D. who were both in the house, and required them to obey. C. having a gun in his hands told them, that if they attempted to break the house he would discharge it at them. M. and the other bailiffs broke one of the windows, and tried to force open the door, and broke one of the hinges, whereupon C. shot and killed M. This was agreed not to be murder; for it was not lawful for the officers to break the house; and tho' the killing an officer in the execution

execution of justice be murder, yet upon a recovery at the suit of a common person, the bailiffs cannot lawfully break the house, so that the act being illegal, this was homicide only and not murder. Jo. 429. Pasch. 15 Car. B. R. Cooke's Case.

slaughter; for he might have resisted him without killing him; but because he seeing

and knowing him shot at him voluntarily, and slew him, therefore they held clearly that it was manslaughter; whereupon they all resolved that it was not murder but homicide only.

9. In Hill. 1659. a latitat issued out to arrest T. returnable Pasch. 1660. and he was arrested there upon the 29th May, and upon the arrest the *bailiff* was killed. Afterwards an act was made to confirm all judicial proceedings, which related to the first day of the Parliament, which was 25 Apr. 1660. The sole question was, whether by the relation of the act, which makes the proceedings legal, and the arrest good, which otherwise had been void and without authority, this killing be murder? it was argued for the King, that by *relation* all the process is made good; because it shall relate to the first day of the Parliament; and for the defendant it was agreed, that the act shall relate to the first day of the Parliament, but *not to such intent as to make that a murder ex post facto*, which was not so when the fact was done. Curia nil dixit. Lev. 91. Hill. 14 & 15 Car. 2. B. R. the King v. Thurston.——But the Reporter adds, that Pasch. 16 Car. 2. he heard that Thurston pleaded his pardon of this murder, whence he infers, that the opinion of the Court seemed to be against him. Ibid.

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10. Sir Ch. S. and A. were indicted in B. R. for murder of a *bailiff* who arrested Sir C. S. near Charing Cross; and the Court directed the jury, 1st. that all that were present and assisting the said S. knowing of the arrest, were principal murderers. 2dly, that tho' the truth of the case was, that Sir Ch. S. was arrested and carried out of the company by some of the bailiffs before the stroke given, yet Sir Ch. was the principal murderer. 3dly, that if any * not knowing the cause of their struggling, but seeing swords drawn, and to the intent to prevent mischief (which by what appeared was the case of A. here) will come in and defend the party arrested, this is not murder in him. The jury acquitted A. but found Sir Ch. S. guilty of murder. Sid. 159. Mich. 15 Car. 2. B. R. the King v. Sir Charles Stanley and Andrews.

Kelyng, 86, 87, S. C. by name of Sir Charles Stanley's case.——

*Kelyng 87. S. C. says, That if while they are fighting one, who, knows nothing of the arrest, coming by the way goes in aid of the person who is arrested,

and draws his sword &c. here if any of the bailiffs be killed, that person who joined in aid against him, though he did not know of the arrest, yet is guilty of murder; for a man must take heed how he joins in any unlawful act, as fighting is; for if he does he is guilty of all that follows; and it being murder to kill those who come to execute the law, every one who joins in that act is guilty of murder, and his ignorance will not excuse him, where the fact is made murder by the law without any malice precedent.

11. A trial at bar was had upon an indictment of murder. The case appears to be thus: Goffe (being a collector of the King's duty of chimney money) came with a constable to the house of one West of Southwark to demand money due upon that account,

count, and entered the house, there being only a maid-servant at home; who telling them, that her master was from home, and that she could not tell where to find him, or come at any money to pay them, they presently *distraigned a silver cup* which stood by. The maid thinking *to prevent the carrying of it away stands against the door* where they were to have gone out, and Goffe took her by the arm and beat her head and back against the door-post divers times, of which she died within three weeks after. The Court was of opinion, that this was but homicide, and directed the jury to find it so; for hindring their passage out to go away with the distrefs was a provocation; and it was found accordingly. Vent. 216. Trin. 24 Car. 2. B. R. Goffe's Case.

(E) How. *By Malice fore-thought, and what shall be said such.*

1. **B.** Royley son of A. Royley fighting with C. and the said C. beating him so as his nose bled, B. thereupon went to his father, complaining unto him of that battery; whereupon A. instantly went into the field, being a mile distance, and finding him, called him villain, and other opprobrious terms, and struck him with a little cudgel, of which stroke he afterwards died. All the Court resolved that it was but manslaughter; for he going upon the complaint of his son, not having any malice before, and in that anger beating him, of which stroke he died, the law shall adjudge it to be upon that sudden occasion and stirring of blood, being also provoked at the sight of his son's blood that he made that assault, and will not presume it to be upon any former malice unless it be found. And although the distance of the place, where his son complained, was a mile, it is not material, being all upon one passion. Wherefore it was adjudged, that it was not murder; and being before the general pardon, was discharged thereby. Cro. J. 296. Hill. 9 Jac. B. R. John Royley's Case.

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S. P. Hawk.
Pl. C. 80.
cap. 31. S.
18, 19.

2. Malice is a design formed of doing mischief to another; cum quis data opera male agit, he that designs and useth the means to do ill is malicious. 2 Inst. 42, odium signifies hatred, atia malice, because it is eager, sharp, and cruel. He that *does a cruel act voluntarily*, does it of malice prepensed, 3 Inst. 62. By the statute of 5 H. 4. If any one out of malice prepensed, shall cut out the tongue or put out the eyes of another, he shall incur the pain of felony. If one does a mischief *ex a sudden*, that is malice prepensed; for my Lord Coke says, if it be voluntary, the law will imply malice. Therefore when a man shall without any provocation stab another with a dagger, or knock out his brains with a bottle, this is exprefs malice, for he designedly and purposely did him the mischief. This is such

An act that is malicious in the nature of the act itself, if found by a jury, though it be sudden; and *the words (ex malitia præcogitata) are not in the verdict.* Kelyng 127. Hill. 5 Ann. B. R. in Case of the Queen v. Mawgridge.

3. A. quarrelled with B. and C. and in the affray A. was hurt. C. came by A's shop *three days afterwards*, and made a wry mouth at him, upon which A. came out of his shop and cut him on the calf of his leg with a sword, whereof he instantly died. Now here being a former quarrel, which had continued three days, the Court, upon the whole matter, directed this to be found *murder*; but if there had been no precedent quarrel, and the wound had been given *upon a sudden provocation* by making a wry mouth without any intention of killing at that time, it had been *otherwise*. 5 Mod. 295. Mich. 8. W. 3. in Case of the King v. Keat.

This was the case of Watts v. Brains. Cro. E. 778. Mich. 42 & 43 Eliz. B. R. and there the defendant's counsel insisted strongly, that this was a new cause of quarrel,

and so the stroke is not upon any precedent malice. But all the Court severally delivered their opinions, that if one make a wry or distorted mouth, or the like countenance on another, and the other immediately pursues and kills him, it is murder; for it shall be presum'd to be malice precedent; and that such a slight provocation was not sufficient ground or pretence for a quarrel, and so delivered the law to the jury, that it was murder, altho' what was insisted upon had been true. And tho' at first the jury brought in their verdict not guilty, yet after much examination &c. they went out again, and brought in their verdict guilty; and the defendant was hanged. Noy. 171. Watts v. Brynes. S. C.

4. Malice *imply'd is prepensed* as much as if there had been a proof of malice or hatred for some considerable time before the act; for the stroke given, or an attempt made by malice imply'd, is as dangerous as a stroke given upon malice expressed, therefore may be as lawfully resisted. This very point was also considered by the 12 judges at Serjeant's-Inn, and by them resolved to be murder upon the occasion of my Ld. Morley's case. When a man attacks another with a dangerous weapon without any provocation, this is express malice from the nature of the act, which is cruel. The definition of malice imply'd is, where it is not expressed in the nature of the act; as where a man kills an officer that had authority to arrest his person, the person who kills him in defence of himself from the arrest is guilty of murder, because the malice is imply'd; for properly and naturally it was not malice; for his design was only to defend himself from the arrest. Kel. 129. Hill. 5 Ann. B. R. in case of the Queen v. Mawgridge.

5. If a man *do an act that apparently must introduce harm*, and death ensue; as to *run among a multitude with a horse used to strike*, is malice imply'd. H. P. C. 44.

And note, That if it were with an intention to do harm,

then it is murder; if without such intention, manslaughter. H. P. C. 44.—The like of *throwing a stone over a house among many people*, the intention of doing harm makes it murder; want of such intention, manslaughter, because the act is unlawful; for an intention of evil, tho' not against a particular person, makes a malice. H. P. C. 44, 45.

6. Any formed design of doing mischief may be called malice; and therefore not such killing only as proceeds from premeditated

tated hatred or revenge against the person killed, but also in many other cases, such as is accompanied with those *circumstances that shew the heart to be perversly wicked*, is adjudged to be of malice prepense, and consequently murder. Hawk. Pl. C. 80. cap. 31. S. 18.

(F) *How. By Intention to do a less Mischief only.*

1. **A** Man was indicted for beating his feme ensient with two infants, by which the one infant died immediately, and after she was delivered of the other infant, who was baptized by the name of John, and two days after he died of the ill which he received, and he was taken and arraigned, and pleaded not guilty; and it seemed to the Court that this was not felony, and therefore he was let by mainprize by award of the Justices. Br. Corone, pl. 68. cites 3 Aff. 2.

Ibid. 408.
Holt Ch. J.
said, that
Mr. Turner's case
was an un-
lucky thing.

2. A gentleman at the bar, upon his wife's complaint that the boy had not clean'd her clogs, took up a clog and kill'd him, without other provocation, and held but manslaughter. Comb. 407. cited Arg. in case of King v. Keate, as Mr. Turner's Case.

3. Wherever a person in cool blood by way of revenge unlawfully and deliberately beats another in such a manner, that he afterwards dies thereof, he is guilty of murder, however unwilling he might have been to have gone so far. Hawk. Pl. C. 83. cap. 31. S. 38.

(G) *How. Without Intention, but in doing an unlawful Act, or an Act not warranted by Law.*

And procla-
mation of
the King is
as the com-
mand of the
King. But
other just-
ices in the
time of

1. **W**HERE men play at sword and buckler, or just by command of the King, and the one kills the other, this is not felony; *contra*, where they do it without command of the King; for tho' those plays are suffered, yet they are not lawful. Br. Corone, pl. 228. cites 11 H. 7. 23. per Fineux J.

Henry VIII. denied the opinion of Fineux, and that it is felony to kill a man in jussing &c. notwithstanding the command of the King; for the command was against law. Ibid.

If men tilt or turney in the presence of the King, or if two masters of defence in playing their prizes kill one another, this will be no felony. Agreed. Hob. 134. Pasch. 14 Jac. in case of Weaver v. Ward.

A. and his man were playing at foils, and the chafe of A's scabbard fell off unknown to him upon a thrust, so that the rapier went into his man's belly, and killed him. And the Court directed the jury, that for as much as such acts are not warranted by law, the parties that use them ought at their own peril to prevent the mischief that may ensue; for consent will not change the case; and therefore tho' there were no intention of doing mischief, yet the thrust being voluntary, was an assault in law, and death ensuing, the offence was manslaughter; yet the jury found it chance-medley, but the Court would not accept the verdict, but charged them if they varied from the indictment to find it specially. All. 12 Pasch. 22 Car. B. R. Sir John Chichester's case.

2. If

2. If the *act* be unlawful, it is *murder*. As if A. meaning to steal a deer in the park of B. *shooteth at the deer*, and by the glance of the *arrow killeth a boy* that is *hidden in a bush*; this is murder because the *act* was unlawful, altho' A. had no intent to hurt the boy, nor knew not of him. But if B. the owner of the park had *shot at his own deer*, and without any intent had *killed the boy* by the glance of his arrow, this had been homicide by misadventure, and no felony. 3 Inst. 56.

3. So if one shoot at any wild fowl upon a tree, and the arrow killeth any reasonable creature a far off, without any evil intent in him, this is per infortunium; for it was not unlawful to shoot at the wild fowl: but if he had shot at a cock or hen, or any tame fowl of another man's, and the arrow by mischance had killed a man, this had been murder, for the *act* was unlawful. 3 Inst. 56.

Holt Ch. J. said, That in case of killing the [509] hen my lord Coke was too large, and that there must

be a design of mischief to the person, or to commit a felony or great riot. Comb. 409.—S. C. cited 12 Mod. 632. Hill. 13 W. 3. Where Holt Ch. J. says, That it must be intended that he shot the hen with intent to steal it; and then because a felonious intent was at the bottom, it will be murder; otherwise that case cannot be law.—Hawk. Pl. C. 83. cap. 31. S. 41. cites S. P. according to Ld. Coke, and makes no objection to it.

4. If the *unlawful act* be *deliberate*, and tend to the personal hurt of any immediately, or by way of necessary consequence death ensuing, is murder. H. P. C. 57.

But if either such deliberation or intention of personal

hurt be wanting, manslaughter. H. P. C. 57.

(H) How. Without Intention, but in assisting Persons doing an unlawful Act.

1. IF a master, maliciously intending to kill another, takes his servants with him without acquainting them with his purpose, and meets his adversary, and fights with him, and the servants seeing their master engaged take part with him, and kill the other, they are guilty of manslaughter only, but the master of murder. Hawk. Pl. C. 85. cap. 31. S. 49.

2. And therefore it follows a fortiori, that if a man's servant or friend, or even a stranger, coming suddenly, see him fighting with another, and side with him, and kill the other; or seeing his sword broken sends him another, wherewith he kills the other, he is guilty of manslaughter only. Hawk. Pl. C. 85. cap. 31. S. 50.

(I) How. By or of one interposing where two are fighting or Quarrelling.

1. IF two men combat, and one comes between them to part them, and the one strikes him against his will; and kills him, yet this

this is felony in him who killed him, and he shall be hanged. Br. Corone, pl. 88. cites 22 Aff. 71.

S. C. cited
Kel. 136.
Hill. 5 Ann.
B. R. in case
of the Queen
v. Maw-
gridge. —
And so if
two be fight-

2. *Diverse men playing at bowles, two of them fell out, and quarrelled the one with the other, and a third man, who had not any quarrel, in revenge of his friend struck the other with a bowl, of which blow he died; this was held manslaughter, because it happened upon a sudden motion in revenge of his friend.* 12 Rep. 87. Trin. 9 Jac. Anon.

ing a duel, tho' upon malice premeditated, and one comes and takes part with him that he thinks may have the disadvantage in the combat, or it may be that he is most affected to, not knowing of the malice, this is but manslaughter. Ibid. Cites Pl. C. 101. John Vaughan v. Salisbury,

A. and B. were fighting in a field, C. casually riding by, and seeing it, and that A. his kinsman was one of them, ran in, drew his sword and killed B. This is clearly but manslaughter in C. tho' it might be murder in A. 3 Bulf. 206. Trin. 14 Jac. The King v. Cary.

If A has malice to B. and engages in a duel along with him, and C. a stranger comes by chance and sides with A. and kills B. this is murder in A. and C. who was present abetting and assisting is only guilty of manslaughter; because he came there of a sudden and knew nothing of the premeditated malice; so tho' it was not warrantable for him to meddle in the quarrel, yet because of his ignorance of the malice he was only guilty of the manslaughter; per Holt Ch. J. 12 Mod. 629. in case of the King v. Plummer.

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S. C. cited
by Holt Ch.
J. 12 Mod.
631. Hill.
23 W. 3. in
case of the
King v.
Plummer.
And says it
was held to
be but man-
slaughter;
because that
tho' T. was
doing an un-
lawful act,
and that D.
or any other
had as much
authority to
keep the
peace as if he
actually

3. T. was indicted for murdering of D. and the jury found a special verdict to this effect, viz. that the day, year, and place in the indictment mentioned T. the prisoner and his wife were fighting in the house of the said D. who was kill'd, and the said D. seeing them fighting came in and endeavoured to part them, and thereupon the said T. thrust away the said D. and threw him down upon a piece of iron which was a bar in a chimney, which kept up the fire, and by that one of the ribs of the said D. was broken, of which he died; and if the Court judge this murder they find so, or if manslaughter then they find so. And it was held that tho' the jury find so, that D. came to part the man and wife, yet it doth not appear whether it is found that T. knew his intent; nor that D. spake any words whereby he might understand his intention, as charging them to keep the King's peace &c. therefore it was held to be only manslaughter, which in law is properly chance-medley, that is where one man upon a sudden occasion kills another without malice in fact or malice imply'd by law. Kelyng. 66, 67. Hill. 16 Car. 2. Thomson's Case.

were a constable, and the killing of one who comes to command the peace, tho' he be no constable, is as much murder as to kill a constable, and that if he had declared that he was come to keep the peace, and commanded them to keep the peace, whereby they might take notice of the cause of his coming, and notwithstanding that, they kill'd him, it would be murder; yet this not being so, it is only manslaughter, because the original quarrel was sudden. But if it had been a deliberate riot, whether he knew him to be a constable or not, or that he came to keep the peace or not, if he kill any body whatever that resists him it will be murder in him, and all that join with him in the deliberate act.

(K) By Accident or acting only Idly.

* It is only
inadvertent
act. Kel.

1. IF I cut my tree and the* branch falls upon a man and kills him against my will, this is not felony; per Catesby, quod Fairfax

Fairfax concessit; for it is not of malice prepenſe nor animo felonico; and also by him, if a man shoots at butts, and his arrow glances, and he kills a man, this is not felony: and Pigot to the same intent. Br. Corone, pl. 147. cites 6 E. 4. 7. 40 cites Poulton de Page 120 where the case is put, and the book cited, and held to be misadventure.

2. If a man casts a * stone over a house and kills a man this is not felony, but a misadventure; per Fineux J. which Brook says does not seem to be law, unless the casting be † lawful. Br. Corone, pl. 228. cites 11 H. 7. * S. P. So of shooting an arrow over a wall or house with which one

is slain, this is misadventure. Kelw. 136. pl. 120—108. pl. 27.—But if a man knowing that many people come in the street from a sermon, throw a stone over a wall intending only to fright them, or to give them a light hurt, and thereupon one is killed, this is murder; for he had an ill intent, tho' that intent extended not to death, and tho' he knew not the party slain. 3 Inst. 57.

† As where a man untiles a house to new cover it, and in the casting the tiles to the ground, the tile strikes a man and kills him against the will of the caster, this is only a misadventure. Br. Corone, pl. 228.—But if he casts sportingly, or for his pleasure, and not in lawful labour, this seems to be felony. Ibid.

3. A. was indicted for the murder of his wife; and upon the evidence the case was, that he being an hackney-coachman found a soldier's pistol in the street, and when he came home he shewed it to his master, and they took the gun-stick and put it into the pistol and it went down into the muzzle of the pistol, by which they thought it was not charged, and his wife standing before him he pulled up the cock and the pistol went off, and being charged with 2 bullets wounded her in the belly and kill'd her, upon which he cried out oh! I have killed my dear wife! and called in neighbours; it was holden by us all, that this was manslaughter, and not only misadventure. Kelyng 41. cites Rampton's Case.

(L) How. By want of Care and whence Mis- [511] chief may probably ensue.

1. H. Was indicted for the murder of C. and upon the evidence the case was, that there were several workmen about building of a house at the Horse Ferry, which house stood about 30. foot from any highway or common passage, and H. being a master workman (about evening when the master workman had given over work, and when the labourers were putting up their tools) was sent by his master to bring from the house a piece of timber which lay two stories high, and he went up for that piece of timber, and before he threw it down he cry'd out aloud stand clear, and was heard by the labourers, and all of them went from the danger but only C. and the piece of timber fell upon him and kill'd him, and my lord Ch. J. Hyde held this to be manslaughter; for he said he should have let it down by a rope, or else at his peril be sure no body is there:

there: but Wild and Kelyng held it to be misadventure, he doing nothing but what is usual with workmen to do, and before he did it, cried out aloud, stand clear, and so gave notice that if there were any near they might avoid it. But they all held that there was a great difference betwixt the case in question, the house from which the timber was thrown standing 30 foot from the highway or common foot-path, and the doing the same act in London streets; for they all agreed, that in *London, if one be cleansing a gutter, and call out to stand aside, and then throw down rubbish or a piece of timber, by which a man is kill'd, this is manslaughter; because in London there is a continual concourse of people passing up and down the streets, and new passengers who did not hear him call out, and therefore the casting down any such thing from an house there into the street is like the case, where a man shoots an arrow or gun into a market-place full of people, if any one be kill'd it is manslaughter; because in common presumption his intention was to do mischief, when he casts or shoots any thing, which may kill, among a multitude of people; but in the case of an house standing in a country town, where there is no such frequency of passengers, if a man calls out there to stand aside and take heed, and then casts down the filth of a gutter &c.* Wild and Kelyng held that to be a far differing case from doing the same thing in London. And because my Lord Hyde differed in the principal case, it was found specially; but Kelyng says, he takes the law to be clear, that it is but misadventure. Kel. 40. January 13. 1664. Hull's Case.

(M) How. By Event.

D. 128. b.
pl. 60. Hill.
2 & 3 P.
& M. seems
to be S. C.
tho' differ-
ing in the
year, the
parties
names being
there the

1. **T**HERE was a variance between M. and H. for wreck of the sea, insomuch that they appointed to fight; and H. with his servants came to M's house to fight with him; and a feme who was aunt both to M. and H. persuaded them to give over this difference; and one of M's servants stung a stone at H. and his servants and by chance kill'd the aunt. This was adjudged murder by reason of the malice which he had to H. Mo. 87. pl. 217. Pasch. 10 Elix. Sir Rd. Mansfield's Case.

And it was there held by Saunders, Higham Ch. B. Whiddon, Brown, and Dalison justices, and Brown and Catlin serjeants, and the attorney and solicitor general, that if it had appeared that she came in defence, or on the behalf of M. it had then been murder in H. and all his companions; but Brook, Stamford, Morgan, Dyer, and Pridaux e contra; for no malice can be prepenſe against the feme, and murder cannot be extended further than was intended.

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Hawk. Pl.
C. 84. cap.
31. S. 42.
cites S. C.
and remarks
that not only
in such cases
were the

2. A. had a wife and a child of 3 years old, and gave poison to B. in order that B. might poison the wife with it. B. put it into a roasted apple and gave it A's wife who was then lying ill in her bed, and she did eat a little of it and gave the rest to the child. A. seeing this chid his wife for giving any to the child, telling her that apples were not good for such children, but he

he let her eat it; and after the *wife recovered, but the daughter died* of the said poison. This was held to be murder in A. but not in B. For as to A. his intention was at the first to kill his wife, and the killing the child shall be construed according to that original intention. But the act of B. can be extended to the wife only. Pl. C. 473. b. Hill. 18 Eliz. 473. Saunders's Case.

very act of a person having such a felonious intent is the immediate cause of a third person's death, but also

where it any way occasionally causes such a misfortune, it makes the offender guilty of murder.

3. An apothecary made up an electuary for A, who was sick, and the *wife put ratsbane into the electuary*, which A. eating part of made him very sick, as it did others who tasted it on A's complaint of it; whereupon the *apothecary* being questioned, and to clear himself that he had not gone contrary to the doctor's prescription, stirr'd it and eat part of it, and thereof died. By the stirring, the poison was the more mixed with the electuary, and that occasioned the death of the apothecary, tho' the others who had tasted of it, and A. also survived. It was resolved by all the justices that the wife was guilty of the murder; for the *law conjoins the murderous intention of poisoning A. with the event* of killing the apothecary. For the putting in the poison was the cause, and his death the event. And had not the poison been put in, the stirring could not have caused his death. 9 Rep. 81. Trin. 9 Jac. Agnes Gore's Case.

Jenk. 290. pl. 29. S. C. and says, it is otherwise where A. commands B. to kill or rob C. and B. kills or robs C. this is not murder or robbery in A. For in this case the instrument which A. used might non agere, but poison could not; for that

is *agens naturale & operatur necessario*, whereas the other [a man, as B. for instance] is *voluntarium agens*.—Serjeant Hawkins says, the stirring is not material; for inasmuch as such a murderous intention, which perhaps in strictness might justly be made punishable with death, *proves now in event the cause of the King's losing a subject*, it shall be as severely punished as if it had had the intended effect, the missing whereof is not owing to any want of malice but of power. Hawk. Pl. C. 84. cap. 31. S. 42.

So if A. puts poison in a pot of wine &c. with intent to poison B. and puts it in a place where he supposes B. will come and drink of it, and by this accident C. (to whom B. had no malice) of his own head takes the pot and drinks of it and thereof dies; this is murder in A. For the law couples the event with the intention, and the end with the cause. And if C. thinking there is sugar in the wine, stirs it with a knife and drinks of it, this will not alter the case. Resolved 9 Rep. 81 b. in Agnes Gore's case.

But if one prepares ratsbane to kill rats and mice or other vermin, and leaves it in places for that purpose, and with no ill intent, and one finding it eats of it and dies, this is no felony. Resolved. 9 Rep. 81. b. in Agnes Gore's cases,—Hawk. Pl. C. 84.—cap. 31. S. 43. S. P. say: it is homicide *per infortunium* only; because the person's intentions were wholly innocent.

(N) How. By Quarrels and Provocations, and what shall be said such.

1. **A.** And B. being friends were at bowls, A. upon hot words killed B. with a bowl; this held but manslaughter. Arg. Comb. 407. cites Mich. 13 Jac. the King v. Newbury.

2. If a man upon a sudden disappointment by another shall resort violently to that other man's house to expostulate with him, and with his sword shall endeavour to force his entrance, to compel that other to perform his promise, or otherwise to comply

S. C. cited 12 Mod. 631. 632. where Holt Ch. J. says, with it was held

here at the bar to be only manslaughter and that the only reason of this reso-

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lution must be because the unlawful act in which Blunt was concerned was a sudden one and without deliberation, and Hales Pl. C. 51. 57. insists very much upon it, that the unlawful

act must be with deliberation, otherwise the killing cannot be murder. with his desire; and the owner shall set himself in opposition to him, and he shall pass at him and kill the owner of the house, it is murder; per Holt Ch. J. Kelyng 134. and to that purpose cited 2 Roll Rep. 460. Clement v. Sir Charles Blunt. Where the case was, that A. had promised a dog to Sir C. B. and being requested accordingly to deliver him, refused, and beat the dog home to his house: at which Sir Charles fetched his sword and came to A's house for the dog. A. stood at the door and resisted his entry, B. thereupon kills A. The jury was merciful, and found this fact in Sir Charles to be but manslaughter; Doderidge was clearly of opinion that it was murder, but the Ld. Ch. J. was a little tender in his direction to the jury. But Rolls makes this remark, that it was *not insisted upon* by the appellant's council, *that C. was in defence of his house*, and that Sir C. attacked him to force in: it was without all question murder, tho' of a sudden heat; for there was *no assault by the deceased* upon him nor on any of his friends, but all the violence and force was on Sir Charles Blunt's side.

the unlawful act must be with deliberation, otherwise the killing cannot be murder.

3. A. with other company was in the Vine Tavern in Holborn in a room, and some other company, bringing with them some women of ill fame, would needs have the room where A. was, and turn him out, to which A. answered, that if they had civilly desired it they might have had it, but he would not be turned out by force; and therefore they drew their swords on A. and his company, and A. drew his sword and kill'd one of them, and it was adjudged justifiable. Kelyng 51. cites Mr. Ford's Case.

S. C. Sid. 277. And the Court in their direction to the jury said, that the difference between manslaughter and murder is, that the first is upon a sudden provocation and the other upon malice premeditation, but what shall be said of sudden provocation

4. A. and B. quarrelled in a tavern, and A. said, that if we fight now I shall have the disadvantage of my high-heeled shoes, and they went out and presently after fought in the fields, when A. killed B. but it was proved by one witness, that at the time C. made a thrust at B. whereupon A. closed with B. and killed him; and depositions of other witnesses that were dead were read to the same purpose. The Court directed the jury that *this was murder in C. being present in aiding*, tho' A. who was a peer and had been tried by his peers was found guilty of manslaughter only. And that as to distance of time between the quarrelling and the fighting to make it murder, such time only is sufficient as may make it appear not to be done upon the first passion, which appeared in this case by A's considering the disadvantage of his shoes. But the jury acquitted C. of the murder and found him guilty of manslaughter only. Lev. 180. Pasch. 18 Car. 2. B. R. Bromwich's Case.

and what not had been a doubt; and it seem'd to some of them, that words without blows is not any provocation, but to make provocation to fight there must be blows; and that if there be provocation in a house, and they thereupon fight, and after, before their reason can get the predominance of their passion, [they fight again and the one kills the other] (the orig. is, et la fight) this is only manslaughter. But if after the provocation in the house they say, that this is not a convenient place (and so have reason [enough] to judge of the conveniency) and appear in another place,

place, this will make it murder, notwithstanding that the fight is to be immediately; for the circumstance shews their temper. But the jury found C. guilty of manslaughter only, and at another day he had his clergy.

5. One Bury had *impress'd a stranger who made no resistance*, Hopkin Hungate finding the *press-master had no warrant* would rescue him, and drew his sword and so did the press-master, and they passed at one another and Hopkin Hungate killed him; held but manslaughter. Comb. 407. Hill. 9 W. 3. B. R. in Case of the King v. Keate cites 1666. Hopkin Hungate's Case.

But Holt Ch. J. said, that in Hopkin Hungate's case he saw the press-masters in possession of the man,

who made no resistance, and that Bridgman, Hale and six more, (contra Kelynge Ch. J. Windham and Moreton) held that it was but manslaughter, because the *restraint without legal warrant* was a sufficient provocation to an Englishman, but if there had been no provocation, then it was agreed it had been murder, tho' blows exchanged. Ibid. 408.

* S. C. Kelyng. 59. 25 April 1666. by name of Hopkin Hungate's case. And they said that if a man be unduly arrested or restrained of his liberty, altho' he be quiet himself, and do not endeavour his rescue, yet it is a provocation to all other men of England, not only his friends but strangers also for common humanity's sake, as my Ld. Bridgman said, to endeavour his rescue; but the three justices above and Twisden J. were of another opinion, and held it to be murder; because there was (as they thought) no provocation at all. [514]

S. C. cited Kelyng. 137. That eight judges conceived it only manslaughter against the opinion of the four justices of B. R. but that the judges of B. R. did conform, and gave judgment accordingly.

6. G. was a smith, and had *ordered his servant to do some business*, and when the master returned they fell to work; the master asked him if he had done what he ordered, the servant said he *had not done it*; then the master said *if you be not more diligent I will have you sent to bridewell*; the servant said, *I had as good go to bridewell as continue in your service*; the master takes up a piece of iron and kills him, and upon a special verdict it was adjudged murder, in Kelyng's time. Comb. 408. cited by Holt Ch. J. Hill. 9 W. 3. B. R. in Case of King v. Keate as 10 October 1666.

7. A. coming into his house, *found B. in the act of adultery with his the said A's wife*, and he *immediately took up a stool and struck B. on the head* so that he instantly died. They found that A. had no precedent malice towards him, and so left it to the judgment of the Court, whether this were murder or manslaughter: the Court were all of opinion that it was but manslaughter, the provocation being exceeding great, and found that there was no precedent malice. Vent. 158. Mich. 23 Car. 2. B. R. * Maddy's Case.

But Twisden said, there was a case found before justice Jones, which was the same with this, only it was found, that the prisoner being in-

formed of the adulterer's familiarity with his wife, he said he would be revenged of him, and after finding him in the act killed him, which was held by Jones to be murder. Which the Court said might be so, by reason of the former declaration of his intent; but no such thing is found in the present case. Ibid. 159.—* S. C. by the name Manning's case, and he had his clergy at the bar and was burnt in the hand, and the Court directed the executioner to burn him gently; because there could not be greater provocation than this. Raym. 212.—S. C. cited Kelyng. 137. by Holt Ch. J. Hill 5 Annæ in case of the Queen v. Mawgridge.

8. A. was *convicted of publishing a libel*, wherein he had accused the King (when Duke of York) that he had hired him

him to kill the late King Charles &c. And on Friday June 20, he was brought to the bar, where he received this *sentence*, viz. *that he should pay the fine of 500*l*. that he should stand twice in the pillory, and go about the hall with a paper in his hat signifying his crime; that on Thursday next he should be whipped from Aldgate to Newgate, and on Saturday following from Newgate to Tyburn, which sentence was executed accordingly; and as he was returning in a coach on Saturday from Tyburn, one Mr. Robert Frances a barrister of Grey's-Inn, asked him in a jeering manner, whether he had run his beat that day, who replied again to him in scurrilous words, thereupon Mr. Frances run him into the eye with a small cane which he had then in his hand, of which wound the said Mr. Dangerfield died on the Monday following; Mr. Frances was indicted for this murder, and upon not guilty pleaded, was tried at the Old-Baily, and found guilty, and executed at Tyburn on Friday July 24, in the same year, 3 Mod. 68. Trin. 1 Jac. 2. B. R. The King v. Dangerfield.——But this should rather be the King v. Frances,*

Skin. 666.

S. C.——

Comb. 406.

Hill 9 W. 3.

S. C. and

there 409.

Rookby J.——

said, he was

not satisfied

that the

stroke on

the head

was before

the using of

the sneyd

or handle of

the scythe,

[515]

and said,

that in case

of life he

would not

take any

thing by in-

tendment.——

S. C. 12 Mod. 118.

Judgment was given against the indictment on the statute of

stabbing, that it was vicious, and therefore quashed it. And as to the indictment at common

law, it is nonsense in the beginning; for it is said, that *A. made an assault on W. and the said A.*

*præfat W. with a certain sword of the value of 5*s*. which he the said A. in his right-hand had*

and held, præfat W. pupugit & percussit, wherein there is a præfat W. too much, and so is nonsense.

Then there is another thing which is very odd, tho' it may not be error, because it may possibly

be a sufficient description, viz. The indictment says, that he gave him a mortal wound *lætitudo-*

nis unis pollicis & profunditatis in & per Corpus. And so the indictment was quashed, and he was

hail'd to appear at the next general gaol delivery for the county of Wilts.

9. *A. the majler sent to W. his gardener for the key of his garden with intent to discharge him from his service; W. refused to send the key, whereupon A. fetched his sword, and went and expostulated with W. about the key, W. said A. should have it if he would; upon this A. drew his sword, and struck W. and cut him on the head. W. endeavoured to strike A. with a bundle of a scythe, but being hindered by the rack of a chimney, he punch'd A. with the handle, and then A. run him through the body, whereof W. died. One question was, if this was within the statute of stabbing, but that was given up; and then the question was, if it was murder. After much argument, the Court said, that it was justifiable in W. to use the handle of the scythe after a cut made on his head by his master; that the provocation given him was very slender, and might be esteemed as none at all; because after the answer sent by W. the prisoner did expostulate with him for some time. Sed Adjournatur, 5 Mod. 287, Mich. 8 W. 3. B. R. the King v. Keate,*

10. *C. was the commanding officer in the guard-room at the Tower, and there was a woman of C's acquaintance in company and others with him, and also there was one M. whom C. had invited hither. M. affronted the woman, so that angry words passed between M. and the woman in presence of C. and*

and the rest of the company, and M. threatened the woman, whereupon C. desired M. to forbear, saying he must protect her. But M. persisted and demanded satisfaction of C. with intent to provoke him to fight; upon which C. told M. that it was not a convenient place but at another time and place he would be ready to give it him, and in the mean time desired him to be more civil or to leave the company. Thereupon M. rose up, and was quitting the room, but as he was going, he snatched up a glass-bottle full of wine and violently threw it at C. and therewith struck him on the head. Upon which C. immediately rose up and threw another bottle at M. and broke his head. But M. immediately after his flinging the bottle at C. without any intermission drew his sword, and thrust C. into the left pap of his breast over the arm of one J. S. notwithstanding the endeavour used by the said J. S. to hinder M. from killing C. and gave C. the wound of which he instantly died. In all this time C. had no sword drawn, nor ever spoke after M. had thrown the bottle. Holt. Ch. J. delivered the opinion of the judges, that M. was guilty of murder. Kelyng 119. Hill. 5 Ann. The Queen v. Mawgridge.

11. No words of reproach or infamy are sufficient to provoke another to such a decree of anger as to strike or assault the provoking party with a sword, or to throw a bottle at him, or strike him with any other weapon that may kill him; but if the person provoking be thereby killed it is murder. Cited per Holt Ch. J. Kel. 130. Hill. 5. Ann. B. R. in Case the Queen v. Mawgridge, as a point positively resolved in the assembly of the judges, 18 Car. 2.

Holt Ch. J. says, that he is therefore of opinion, that if A. and B. are in company together, and B. gives A. consuetudinary language, and

A. is so provoked that he draws his sword, and makes a pass at B. (B. then having no weapon drawn) but misses him, and thereupon B. draws his sword, and passes at A. and there being an interchange of passes between them, A. kills B. that this is murder in A. For A's pass at B. was malicious, and what B. afterwards did was lawful; But if A. who had been so provoked draws his sword, and then before he passes, B's sword is drawn; or A. bids him draw, and B. thereupon drawing, there happen to be mutual passes; If A. kills B. this will be but manslaughter, because it was sudden, and A's design was not so absolutely to destroy B. but to combat with him, whereby he run the hazard of his own life at the same time. But if time was appointed to fight (suppose the next day) and accordingly they do fight, it is murder in him that kills the other; but if they go into the field immediately and fight, then but manslaughter. Suppose, upon provoking language given by B. to A. A. gives B. a box on the ear, or a little blow with the stick, which happens to be so unluckily that it kills B. who might have some imposthume in his head or other ailment which proves the cause of B's death, this blow, tho' not justifiable by law, but is a wrong, yet it may be but manslaughter, because it does not appear that he designed such a mischief, Kel. 130, 131.

12. Two strive for the wall, and one kills the other, this is manslaughter. H. P. C. 57.

(O) How, By one in a Company where it is [516]
Murder in another.

1. IF 20 come to do an unlawful act, and one of them kills a man, all shall be adjudged felons. Br. Imprisonment, pl. 40.

In cases where the principal intent is to

commit a breach of the peace, not intended against the person of him that happens to be slain, it seems clear, that regularly where divers persons resolve to resist all opposers in the commission of any breach of the peace that naturally tends to raise tumults, as by committing a violent disseisin with great numbers of people, hunting in a park &c. and in so doing happen to kill a man, they are all guilty of murder; yet if such disseisors having forcible possession of an house afterwards kill the person, whom they ejected, as he is endeavouring in the night forcibly to re-enter, and to fire the house, they are guilty of manslaughter only; perhaps for this reason chiefly, because the party slain is himself so much in fault; but in such or any other quarrel, if a peace officer doing his duty tho' not known, or even a private person, giving proper notice of his intention to keep the peace, be slain, it will be murder. Hawk. Pl. C. Abr. 90. cap. 31. S. 17—In the Fol. Edit. it is Page 84. cap. 31. S. 46, 47, 48.

S. C. Kelyng. 87.
acc. cites 34
H. 8. Br.
[N. C.]
Sect. 237.
and says the
Lord Dacres
was hanged.
—S. C. cited
12 Mod.
630. Hill.
13 W. 3.

2. Lord Dacres and others *agreed to enter into a park and hunt there, and to kill all that should resist them.* They accordingly entered the park, and a person [or keeper] came to one of the company, and asked him what business he had there, and the other killed him, the lord being a quarter of a mile from the place and knowing nothing of it, yet this was adjudged murder in him, and in all his companions. And also another went into an orchard to gather pears, and one coming to him and rebuking him, he killed him, and this was adjudged murder. Mo. 86. pl. 216. Pasch. 10 Eliz. Ld. Dacres's Case.

S. C. adjudged. When the offenders fled, the keeper's servants called to them to stand, which they ought to have done, and to have yielded themselves to the keepers. 2 Roll. R. 120 Wormal's Case. — S. P. 12 Mod. 630. Hill 13 W. 3. cited by Hale Ch. J. in case of the King v. Plummer.

3. A. B. C. and D. *with pikes and other arms went into Hyde Park in the night to steal venison.* The keeper's servants assaulted them. They fled; one of the servants shot off a gun, and wounded one of them; they returned, and A. wounded one of the keepers, of which he died about 10 days after; this was held wilful murder in *all; because they were about an unlawful act, and this event shews their malice and intent ab initio to kill all, that resisted their wicked purpose, with the weapons which they carried with them. Palm. 35. Trin. 17 Jac. B. R. War-mole's Case.

4. N. coming to an Inn, *J. S. and W. R. quarrelled with his servants, and beat them, which N. hearing of came into the room but after the affray was over, and beat them, but one of them threw N. upon the ground, whereupon one of the servants drew his sword in defence of N. his master, and happened in the scuffle to wound N. of which he died soon after.* The coroner's inquest found the servant guilty murder, and acquitted the others. Whereupon the others were indicted and found guilty of manslaughter; and as to the servant, Kelyng J. directed the jury to find the servant guilty of manslaughter, tho' it appeared that the hands of others were upon the sword at the time of the stroke given, and so all were found guilty of manslaughter. Sid. 254. Pasch. 17 Car. 2. B. R. The King v. Nevil.

5. If two, three or more are *doing an unlawful act*, as abusing the passers by in a street or highway, if one of them kills a passer-by, it is *murder* in all, and whatever mischief one does they are all guilty of it; and it is lawful for any person to at-
tack

tack and suppress them, and command the King's peace; and such attempt to suppress is not a sufficient provocation to make killing manslaughter, or son assault demesne a good plea in trespass against them. per Holt Ch. J. 12 Mod. 256. Mich. 10 W. 3. Ashton v.

6. *Eight wool runners being met in a lane by the King's officers,* [517]
as they were going with the wool to the sea-side, and the Kel. 109.
word of seizure given by the officers, A. one of the gang fired his S. C.
gun and killed J. S. one of his own gang, viz. one of the eight,
and now B. another of the gang was indicted for the said murder. This case having been for two vacations under the consideration of all the judges of England, and several times argued before them, it was at length unanimously resolved, that *this was not murder in the rest of the gang, it not being found that he shot at any of the King's officers, which, if found, would have made it murder in all;* but the jury not having found that fact, the judges cannot intend it; and it being possible that the discharge of the piece might be by accident or chance they must rather intend it to have been fired upon some other occasion than against the King's officer; and therefore B. the prisoner was acquitted. 12 Mod. 627. 633. Hill 13 W. 3. B. R. The King v. Plummer.

7. It is a general receiv'd opinion, that if two persons, viz. A. and B. *are engaged in an unlawful act*, and a stranger is killed by one of them, this makes the other guilty of murder, by reason of their being both originally engaged in the unlawful act. But this has several qualifications and limitations. 1st. *He must know of the other's malicious design, and which is foreign and different to the original ill design engaged in,* or otherwise he shall not be guilty of murder. 2dly, *The act of one whereby death doth ensue must be in pursuance of the original unlawful act;* as if several go into a park to hunt where they have no right, and immediately after two of them quarrel, and one kills the other, it is only manslaughter in him that kills, and no offence in the rest; because the killing was not in pursuance of the unlawful act which they were all engaged in. 3dly. *The unlawful act must be deliberate;* for if it be done on a sudden, the death occasioned by pursuance of it will not amount to murder. 4th. *The act must not only be deliberate, but must also be to do hurt to some body either immediately or consequentially,* or otherwise the killing is not murder. 5th. *Tho' such deliberate unlawful act tend not to the hurt of any person, yet the being unlawful will make it manslaughter.* And further, *tho' it be not with design to hurt any person, yet if it be such an unlawful act as is felony, and carried on with a felonious intent, and in pursuance of such act a man is kill'd,* such killing is murder not only in him by whose hand the person falls, but also in all those concern'd in the felonious intent. As if divers agree to rob a house, and some are placed in a passage leading to the house,

house, and a person coming by is stopt by those in the passage, and is killed in the scuffle by one of them, and no robbery is committed, yet this will be murder in all those that were by at the time, and likewise in all those that went to rob the house, and were not actually present. Per Holt.Ch. J. in delivering the reasons of the resolutions of all the judges in England. 12 Mod. 627. to 633. Hill. 13 W. 3. The King v. Plummer.

8. Indictment against A. for the murder of J. S. and also against B. C. D. and E. as persons present, assisting, aiding, and *abetting* A. therein. E. being arraigned upon this indictment pleaded not guilty, and upon evidence it appeared, that the person slain was a constable, and in the execution of his office with divers other constables in May-Fair; that E. the prisoner first drew his sword, and *with divers others, to the number of 40 persons, fell upon the constables*; that this affray continued an hour after, till in the end one of the constables, viz. the said J. S. was slain, but by whose hand it did not appear. It also appeared, that A. had been tried on this indictment, and acquitted; and per Holt Ch. J. 1st. Tho' the indictment be against the prisoner for aiding, assisting, and abetting A. who was acquitted; yet the indictment and trial of this prisoner is well enough; for who actually did the murder is not material; the matter is, that a murder was committed, and the other is but a circumstance, and all are principals in this case; therefore if a murder be proved, it is well enough. 2dly. If a man begins a riot, as in this case, and the same riot continues, and an officer is killed; he that began the riot, as the prisoner here did, is a principal murderer, tho' he did not do the fact. 1 Salk. 334, 335. Octob. 14, 1703. the Queen v. Wallis.

9. Two men were beating another man in the street, and in the night-time, and a stranger passing by at the same time said, *he was ashamed to see two men beat one*; whereupon one of those who was beating the other ran to the stranger in a furious manner, and *with a knife*, which he held in his right hand, gave him a deep wound of which he died soon after; and now both the other were indicted as principals for the said murder; but the judges were of opinion, that because it did not appear that one of them intended any injury to the person killed, he could not be guilty of his death, either as principal or accessory; it is true, they were both doing an unlawful act, but the death of the party did not ensue upon that act; so he was acquitted, and the other was found guilty. 8 Mod. 164, 165. Trin. 9 Geo. Anon.

(O. 2) Being in Company with, and *what privity will make a third person guilty* of Murder, or Manlaughter.

1. THE following questions were proposed by the peers to the judges, to which they gave the following answers.

——— 1st

———1st. In case a man shall murder another, whether all *those in his company at the time of the murder* are so necessarily involved in the same crime, that they may not be *seperated* from the crime of the said person, *so as in some cases to be found guilty only of manslaughter?*——Answer, The crime of those who are in the company at the time of the murder committed, may be so *seperated* from the crime of the person that committeth the murder, as in some cases they are only to be found guilty of manslaughter.———2dly. *A. conscious of an animosity between B. and C. A. accompanieth B. where C. happens to come, and B. kills him, whether A. without any malice to C. or any actual hand in his death, be guilty of murder?*——Answer, A. is not guilty of murder; for it appears the meeting was casual, and there was no design in A. against C. and therefore tho' A. did know of the malice between B. and C. yet it was not unlawful for A. to keep company with B. but he might go with him any where, if it was not upon a design against C. And therefore as the case was put, there was not any offence in A.———3d. *Whether if A. heard B. threaten to kill C. and some days after A. is with B. upon some other design, where C. passes by, or comes into the place where A. and B. are, and C. shall be killed by B. A. standing by without contributing to the fact, his sword not being drawn, nor any malice ever appearing on A's part against C. whether A. will be guilty of the murder of C?*——Answer, A. in this case would not be guilty either of murder or manslaughter.———4th. *Whether a person knowing of the design of another to lie in wait to assault a third man, who happens to be killed when the person who knew of the design is present, be guilty of the same crime with the party who had the design, and killed him, tho' he had no actual hand in his death?*——Answer, This is neither murder nor manslaughter. *But if he that knew of the design had advised it, or agreed to it, or lay in wait for it, or resolved to meet the third person with him that killed him, it would have been murder.*———5th. *Whether a person, knowing the design of another to lie in wait to assault a third person, and accompanying him in that design, if it shall happen, that the third person be killed at that time in the presence of him who knew of that design, and accompanied the other in it, be guilty in law of the same crime with the party who had that design, and killed him, tho' he had no actual hand in his death?*——Answer, If a person is privy to a felonious design or to a design of committing any personal violence, and accompanieth the party in putting that design in execution, *tho' he may think it will not extend so far as death, but only beating, and hath no personal hatred, nor doth otherwise contribute to it, than by his being with the other person when he executeth his design of assaulting the party, if the party dieth, they are both guilty of murder; for by his accompanying him in the design, he shews his approbation of it, and gives the party more courage to put it in execution, which is an aiding, abetting.*

abetting, assisting and comforting of him, as laid in the indictment.—6th. If *A.* be present when *B.* said he would stab *C.* upon which *A.* said he would stand by his friend, and afterwards *B.* doth actually murder *C.* and *A.* is present at the murder; whether the law will make *A.* equally guilty with *B.* or what crime is *A.* guilty of?—Answer, This is rather a case of fact than law; for if *A.* was *designedly present* with the other that committed the murder, then it would be murder in *A.* and if there was no evidence to prove upon what account he was present, it might be presumed he was present in pursuance of his former agreement; but if it appeared he did not meet in pursuance of that agreement, then it might not be murder. That this was all matter of evidence, and rested upon the consciences of those that were to try the prisoner.—

7th. If *A.* accompanieth *B.* in an unlawful action, in which *C.* is not concerned, and *C.* happeneth to come in the way of *B.* after the first action is wholly over, and happeneth to be killed by *B.* without the assistance of *A.* whether *A.* is guilty of that man's murder?—Answer, As this case is stated, *A.* is not guilty of murder. Holt's Rep. 479, 480, 481. cites 31. Jan. 4 W. & M. in the Trial of *Ld. Mohun.*

See (N) pl. 3. (P) *Justifiable.* In what Cases. And Pleadings.

And every man may apprehend thieves, and if they will

not render themselves he may kill them if he cannot otherwise take them. *Ibid.* per Thorp.

If a thief offers to rob or murder *B.* either abroad or in his house, and thereupon assault him, and *B.* defends himself without any giving back, and in his defence kills the thief, this is no felony; for a man shall never give way to a thief &c. neither shall he forfeit any thing. 3 Inst. 56.

2. A servant may kill a man in saving the life of his master, if he cannot otherwise escape. Br. Corone, pl. 63. cites 21 H. 7. 39. per Tremaile J.

The rule of unavoidable necessity admits an exception when the law doth intend some fault or wrong in the party that

hath brought himself in the necessity: so that is *necessitas culpabilis*. This I take to be the chief reason why *seipsum defendendo* is not matter of justification, because the law intends it hath a commencement upon an unlawful cause; for quarrels are not presumed to grow without some wrong, either in words or deeds on either part, and the law, that thinketh it a thing hardly triable in whose default the quarrel began, supposes the party that kills another in his own defence not to be without malice; and therefore as it doth not touch him in the highest degree, so it putteth him to sue out his pardon of course, and punishes him by forfeiture of goods; for where there cannot be any malice or wrong presumed, as where a man assaults me to rob me, and I kill him that assaulteth me; or if a woman kill him that assaulteth her to ravish her, it is justifiable without any pardon. Bac. Elements, 28.

4. Accord-

4. According to the opinion of the old books (which in this respect seem to be contradicted by others more modern) it seems that one may *set forth a fact amounting to justifiable homicide in a special plea to an indictment* or appeal of murder; and that the same being found true, he shall be dismiss'd without being arraigned or inforced to plead not guilty. And indeed it seems extremely hard that a sheriff or judge who condemns or executes a criminal &c. should be forced on a frivolous prosecution to hold up their hands at the bar for it &c. But it is agreed that no one can plead a fact amounting to homicide *se defendendo* or by misadventure, but that in such a case the defendant must plead not guilty, and give the special matter in evidence. And it is also agreed that were a special fact amounting to justifiable homicide is found by the jury, the party is to be dismissed without being obliged to purchase any pardon &c. Hawk. Pl. C. 69. cap. 18. S. 3.

See (Q)
Pl. 1.

(Q) Justifiable by Officers or Persons having Warrants.

1. A Man was appointed by *precept to take felons indicted of felony and shewed them the precept*, and commanded them to render themselves to the peace, *and they would not render, but stood to their defence and killed and wounded diverse persons, and in his taking he killed N. one of the thieves* and was thereof indicted, and pleaded this matter and justified by it, and did not intend that the King would impeach him thereof, and well, and was permitted to justify it without being compelled to plead not guilty. Br. Corone, pl. 87. cites 22 Aff. 55.

And there the jury was charged if he might otherwise have taken the thief, and if there are others of the same name of him who was killed, and found all for

the defendant, by which he went quit without charter of the King. Ibid.—Br. Charters do Pardon, pl. 31. cites 22 Aff. 5.

If any officer or minister of justice hath a lawful warrant, and the party assaults the officer or minister of justice, he *is not bound by law to give back*, but to carry him away: and if in execution of his office, he cannot otherwise avoid it but in striving kill him, it is no felony. And in that case the officer or minister of justice shall forfeit nothing; but the party so assaulting or offering to fly away is killed, he shall forfeit his goods and chattels. 3 Inst. 56.

2. And note by Thorp for law, that in several cases a man may justify the death of a man, as where a gaoler who came into the gaol with a hatchet and found the prisoners loose, and they beat him, and he killed two of them with the hatchet, and it was awarded by the council well done, therefore it seems that he may justify. Ibid.

(R) Excusable.

1. If a parent or a master be provoked to a degree of passion by some miscarriage of the child or servant, and the parent or

or master shall proceed to *correct* the child or servant with a moderate weapon, and shall by chance give him an unlucky stroke so as to kill him, that is but a misadventure. But if the parent or master shall use an improper instrument in the correction, then if he kills the child or the servant it is murder; and so it was resolved by all the judges in B. R. with the concurrence of the Ld. Ch. J. Bridgman in a special verdict in one Gray's case, found at the Old Baily 10 Octob. 18 Car. 2. who struck his servant with an iron bar. Kel. 133. Hill. 5 Annæ B. R. in case of the Queen v. Mawgridge.

* Homicide *per infortunium*, or by misadventure,

is where a man in doing a lawful act without any intent of hurt unfortunately chances to kill another. Hawk. Pl. C. 73. cap. 29. S. 1.

[521] † Homicide *se defendendo* seems to be where one who has no other possible means of preserving his life from one who combats with him on a sudden quarrel, or of defending his person from one who attempts to beat him, (especially if such attempt be made upon him in his own house) kills the person by whom he is reduced to such an inevitable necessity. Hawk. Pl. C. 74. cap. 29. S. 13.

(S) Amounts to Petty Treason. In what Cases.

S. C. cited 3 Inst. 20. and says that the judgment at this day of a woman for petit treason is the same.

1. ALICE of W. of the age of 13 years was burnt by judgment, because she had killed her mistress, and therefore treason. And so see that for treason a feme shall be burnt. And see that treason may be as well to the mistress as to the master. Br. Corone, pl. 74. cites 12 Aff. 30.

This was petty treason at common law, as appears by 12 Aff. and

says that with this agrees the 21 E. 3. where Ld. Coke says the reader must know, that instead of (mere) in that case he must read (maister.) 3 Inst. 20.

Anciently an attempt to kill a husband, piracy by a subject, discovery of the King's counsel by a grand-juror, and many other offences, came under the notion of petit treason; but now by this statute it is reduced to three instances, viz. where a servant kills his master &c. [as above] Hawk. Pl. C. Abr. 93. cap. 32. S. 1.

Aiders, abettors and procurers of any of these petit treasons are within this law. 3 Inst. 20. And are punishable in the same manner as before; for the statute meant only to exclude other crimes from being accounted petit treasons, but not to alter the law as to these. Hawk. Pl. C. Abr. 94. cap. 32. S. 5.

* A servant was arraigned for killing his master's wife *proditorie* and he confess'd it, and it was adjudged by advice of all the justices of both benches, that it was petit treason; for as well the mistress as the master have || affiance in him; by which it was awarded that he be drawn and hang'd and not hanged only, quod nota; and no mention of beheading; for it seems this is of high treason. Br. Treason, pl. 8. cites 19 H. 6. 47.—S. C. cited Pl. C. 86. b. Hill. 6 & 7 E. 6. in case of Croker v. Strange.—S. C. cited 3 Inst. 20. For he is || servant both to the husband and wife.—S. P. Hawk. Pl. C. Abr. 93. cap. 32. S. 3.

If a child commit *parricide* in killing his father or mother, (which the law-makers never imagined any child would do) this is out of the statute, unless the child served the father or mother for wages or meat, drink or apparel; for this is not any of the three kinds specified in this act, and yet it is a more impious offence in a child than in a servant, but the judges are restrained by this act

to interpret it a simili, or a minore ad majus. And some say that parricide was *petit treason* by the common law. 3 Inst. 20.—S. P. Hawk. Pl. C. Abr. 93. cap. 32. S. 2.

† This was adjudged *petit treason* by the common law, as it appeareth in our books. If the wife procure one to murder her husband, and he doth it accordingly, in this case the wife being absent is but accessory, and shall be hanged and not burnt, because the accessory cannot be guilty of *petit treason* where the principal is not guilty but of murder: And the accessory must follow the nature of the principal; but if he that did the murder had been a servant of the husband, it had been treason in them both, and the wife should have been burnt; and so it is in the case before of a *servant*, and in the case hereafter of a clerk. If the wife and a stranger kill the husband it is *petit treason* in the wife and murder in the stranger, and so it is in the case of the servant next before, and of the clerk next after. 3 Inst. 20.—S. P. Because the offence of the accessory cannot rise higher than that of the principal. Hawk. Pl. C. Abr. 94. cap. 32. S. 7.

‡ This clause is to be understood only of an ecclesiastical person be he secular or regular, if he kill his prelate or superior to whom he oweth faith and obedience, it is *petit treason*; and so it was at the common law. And *petit treason* doth presuppose a trust and obedience in the offender either civil, as in the wife and servant, or ecclesiastical, as in the ecclesiastical person. 3 Inst. 20.

3. A servant departed out of his master's service, and a year after killed him who was his master for malice that he bore against him when he was his servant, by which he was drawn and hang'd. Br. Corone, pl. 116. cites 33 Ass. 7. 3 Inst. 20. cites S. C. S. P. Hawk. Pl. C. 88. cap. 32. S. 4.

4. In an indictment of a servant for the murder of his master, the word *proditorie* was omitted, so that the indictment was only as of a common murder. And it appearing upon the evidence that the offence was *petit treason*, and such offence being discharged by a general pardon in which murder was excepted, tho' the defendant was arraigned and found guilty upon this indictment of murder, yet the judge of assize reprieved the prisoner, for which he was blamed by some, but without reason, as it seem'd to the justices. D. 235. a. pl. 19. Mich. 6 & 7 Eliz. Anon. [522]

5. A woman servant conspired with her lover to rob her mistress. The man came in the night and she hid him, and afterwards the man killed the mistress. This is murder in the man and treason in the woman servant. Mo. 91. pl. 227. Trin. 10. Eliz. Anon. S. P. Whether the servant be actually present only in judgment of law, as being in the

same house, tho' not in the same room when the fact was committed; and if a servant or even a stranger procure a servant in his absence to murder the master, it seems that he is an accessory to the *petit treason*. Hawk. Pl. C. Abr. 94. cap. 32. S. 7.

6. If the killing of a master be attended with such circumstances as would have made it murder, if the person killed had been a stranger, it will be murder in the servant, but if it were upon such a sudden affray as would have made it *manslaughter*, or *se defendendo* only in the case of a stranger, it will be no higher a crime in the servant; and it shall never be construed to amount to *petit treason*, but where in the case of a stranger it would have been murder; for all *petit treason* includes murder, and is the highest degree of it. Hawk. Pl. C. Abr. 94. cap. 32. S. 6.

(T) Intending

(T) *Intending and attempting to Murder but not doing it; In what Cases it is Felony.*

1. **A** Boy came to his master's bed and trench'd hard upon his throat to have strangled him in order to rob him, and was hang-ed. Quære if it was not burglary. Br. Corone, pl. 214. cites 15 E. 2.

(U) *What is Murder, and what Trespass.*

1. **W**HERE a man shoots at butts and kills another against his will, or if a tiler upon a house permits a stone to fall upon a man, and kills him against his will, this is not felony; for there the intent is to be construed; but it [the intent] is not to be construed in trespass, therefore if such archer or tiler strikes a man and does not kill him trespass lies; note the difference. Br. Corone, pl. 59. cites 21 H. 7. 29.

(W) *Indictment. Good or not.*

The word *murdravit* implies *malitia præcogitata*, and therefore supplies the omission thereof, but it does not imply the word *felonice* being omitted.

Per tot. Cur.

Buls. 93. Mich. 8. Jac. in Penruddock and Lanxsford's case.

The word *murdravit* in an indictment may well stand for manslaughter; per Croke J. and per Williams J. if the indictment is *murdrum*, and does not therein mention *ex malitia sua præcogitata*, this shall be taken only for manslaughter, and so it has been ruled divers times. Buls. [523] 144. Trin. 9. Jac. in case of Bradley v. Banks. cites 1 Mar. D. 99. pl. 63.—The case in D. 99. a. pl. 63. is thus. viz. Item where an indictment of murder or manslaughter ought to have expressly a stroke supposed, viz. *Talc die & anno felonice & ex malitia sua præcogitata interfecit & murdravit &c.* without saying *percussit*—5 Rep. 122. b. cites S. C. that such indictment without *percussit* is not good; for such indictment ought expressly to have a stroke to be supposed. And the Court held this to be true in all indictments of murder or manslaughter unless in the case of *poysoning*. And it was there resolved, that an indictment may say *percussit* as well of a stroke given out of a gun or bow, as with a hand. Mich. 2 Jac. B. R. in Long's case.—And cites 10 E. 4. S. P. and *ibid.* 123. a. the Reporter says he had seen several precedents where the stroke was given by a bullet out of a gun, or by an arrow out of a bow, and that all of them had the word *percussit*.—An indictment was *quod &c. percussit*, and did not say *felonice percussit*, and exception being taken thereto, the Court were clearly of opinion, that the indictment was insufficient for omitting (*felonice*) and the same is not supplied by the word *murdravit*, and that the case in D. 68. pl. 28. 5 E. 6. [supra] is not law. Buls. 93. Mich. 8 Jac. Penruddock and Lanxsford's case.

2. *Exceptions*

2. Exceptions were taken to an indictment, because it was said to be *taken coram coronatore in comitatu præd.* and does not say *coronatore comitatus præd.* sed non allocatur. For by reasonable intendment it shall be taken to be the coroner of the county.—2. Because it does not say, that *the deceased was in pace Dei & Domine Regine*; sed non allocatur. For those are only words to amplify the heinousness of the act, and are not of substance, and perhaps he was not in the peace, but fighting and breaking the peace; and many precedents were shewn where those words were omitted.—3. Because it was *felonice percussit & dedit eidem* (the deceased) *adtunc & ibidem* unam plagam &c. but did not say *felonice*, nor *ex malitia sua præcogitata dedit* &c. sed non allocatur. For the conjunction (*et*) couples the sentences together, so that the words (*felonice et ex malitia sua præcogitata*) mentioned before refer to all the subsequent words, avoids tautology; besides, the words (*adtunc & ibidem*) makes it clear, that all was done at one and the same instant.—5. Because it was said, that *tempore felonie & murdred. prædict.* where it should be *murdri*; sed non allocatur. For *tempore felonie præd.* had been sufficient without saying *murdred*, and the addition shall not hurt; because *murdredum* is an insensible word, and so no contrariety appears, and surplusage never hurts but when it is repugnant or contrariant to the matter precedent or subsequent.—6. Because *the wound was given the 4th day of August, and the death was the 19th of December next ensuing &c.* the indictment was, that the offenders *tempore felonie & murdri præd. fact. viz. 4th Augusti &c. felonice fuerunt præsentcs &c. ad feloniam & murdrum præd. in forma prædict. faciend.* In answer to which it was urged, that the death shall have relation to the stroke; for the death is but in a manner the execution of the felony. But the whole Court held e contra, and said, that they had often adjudged indictments insufficient when the stroke is one day and the death on another; but said, that in the case at Bar the indictment should have been, that the said persons present and abetting, *fuerunt præsentcs & auxiliantes &c. ad feloniam & murdrum in forma prædict. faciend.* And it was further urged in maintenance of the indictment, that the office of the jury is to find *veritatem facti*, and of the judges to declare *veritatem juris*; and that the jury having found the whole circumstance and truth of the fact, tho' they take upon themselves the office of judges also to determine when and at what time the felony was done, this shall not vitiate that which they have found sufficiently and certainly; for in all cases where a jury find a matter, with which they are charged, at large, and conclude over against law, the verdict is good, and the conclusion ill. And further it was urged in maintenance of the indictment, that it sets forth, that they all assaulted the deceased feloniously, and of malice prepense, and then tho' one only gave the stroke, yet all are guilty of the murder, it

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appearing by the connection of all parts of the indictment, that all were present. But the Court on conference with the other justices held the 6th exception repugnant and insufficient as to the persons present; for till the death no felony was committed, and none shall be adjudged felons by relation, which is only a fiction of law. But Wray said, that the year to bring the appeal shall be computed from the death and not from the stroke, and that so was the common experience of B. R. and that the law was so without question, contrary to the opinion of Stamford. But it was resolved, that to conclude that *he did the murder the last day was sufficient*; tho' the better form is to conclude that he did the murder *modo & forma supradict.* 2. It was resolved, that the clause of *præsentes auxiliantes &c.* was necessary, and the indictment had been insufficient without it; for it shall not be maintained by argument or implication, nor supply'd by intendment, and that as to this 2d point, it was so resolved in Milborn's case. Pasch. 1. Jac. B. R. and because the indictment wanted the said clause, he and divers others were discharged. 4 Rep. 41. a. to 42. b. Trin. 28 Eliz. B. R. Heydon's Case.

3. Indictment was alleged to be taken at *C. infra libertatem dominæ reginæ villæ suæ de C.* but did not set forth whether the vill of *C.* was within the liberty of *C.* exception being taken thereupon, the Court resolved that it was sufficient. For if an indictment has a *certain intent in general* it is enough. 5 Rep. 120. a. 121. a. Mich. 2 Jac. B. R. Long's Case.—And Popham said, that S. P. was resolved in the Case of the Rape of Lewes in Suffex. Ibid.

* The word vulnus was objected to, and urged, that it ought not to be used in indictments, any more than *ictus*,

4. The indictment was *dans &c. unum * vulnus mortale in & super anteriorem partem corporis ipsius H. L. subter sinistram mamillam &c.* which word (mamillam) with a single (m) was objected to as insensible, and that it should be (*mammillam*) with a double (m) but resolved, the *false Latin* shall not quash indictments; however, mamilla is as good Latin as mammilla. 5 Rep. 121. a. b. Long's Case.

but that it ought to have been *unam plagam*. But the whole Court disallowed the exception; for *plaga & vulnus* are synonyms, tho' *plaga* is the more usual word in indictments. Ibid. 121. b.

* S. P. was resolved. 4 Rep. 42. Trin. 28. Eliz. B. R. in Heydon's case, where the pann of the knee was cut wholly off, and that so it is if a man's head be cut off, the profundity or latitude of the wound shall not be shewn.

5. Another exception was taken for *not shewing the longitude or profundity* of the wound. But this was disallowed by the whole Court; for the longitude and profundity ought to be alleged to the intent it may appear to the Court, that the wound was mortal, and so the cause of his death; but in this case the bullet went thro' his body, so that it *was apparent to be mortal*; and in some cases the dimensions * cannot be alleged, as when a hand, foot &c. are cut off. 4. Rep. 121. b. 122. a. Long's Case.

6. Another

6. Another exception was taken, because the indictment was *dans &c. cum pulvere & pelletto plumbeo prædict. &c. vulnus mortale &c. totaliter penetrans in & per corpus &c.* which it was insisted could not be; for that penetrans agrees with vulnus, and not with pelletto; for then it should be penetrante in the ablative case; sed non allocatur, the sense and words being significant, and such as are used by the lay-gents. 5 Rep. 122. a. Long's Case.

7. Another exception was, that the indictment wanted the word * *percussit*. The words of the indictment as to this purpose, were, viz. *Prædictus H. D. quoddam tormentum, &c. cum pulvere & pelletto plumbeo onerat. &c. in & super ipsum H. L. exoneravit dans eidem H. L. adtunc & ibidem cum pelletto plumbeo præd. extra tormentum præd. per ipsum emisso unum vulnus mortale &c.* It was resolved per tot. Cur. that for this cause the indictment was insufficient. For the clause before dans eidem, &c. was not sufficient of itself; for tho' H. D. discharged the gun upon him, yet it may be that he did not strike him by it. And as to the 2d clause of dans eidem &c. that cannot make it good; for the clause dans &c. depends upon the first clause, describes only the stroke to shew it to be mortal, which ought to appear by the first sentence to be given, which it does not, or that any stroke was given; for (dans) is a participle depending upon the verb precedent, and that is (exoneravit) and exoneravit may be without any percussio. 5 Rep. 122. a. b. Long's Case.

* See in the Notes at pl. 1.

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8. A. was indicted of manslaughter, and after of murder; the indictment was, that *adtunc & ibidem in sinistra parte collis percussit*, whereas it should have been (*colli*) the Court held that for this reason the indictment was not good. Bulf. 109. Pasch. 9 Jac. B. R. the King v. Lemman.

9. If the offender is outlawed upon a faulty indictment before the coroners, as where the indictment was (*collis*) for (*colli*) exception cannot be taken to the indictment, and he has no other remedy but a writ of error, and that is his right course. Bulf. 109. the King v. Lemman.

10. Exceptions were taken to an indictment, setting forth the assault and battery to be on the 12th of February at O. and that he gave him a blow on the right side, viz. *dans eiden A. unam plagam mortalem & adtunc & ibidem*, but without shewing any time certain when this blow was given.—As to this Williams J. said, that here is * *no place laid where the stroke was given*, and for this omission the indictment is not good; for that ought to be certainly laid, and that so is Long's case. 5 Rep. 120, 121. for he may assault him at one place, and give the stroke in another, as in Lacy's Case. 2 Rep. 49. put in Bingham's Case. And Croke J. said, that as to the point of time, the words *adtunc & ibidem* refers to all the whole sentence—2. That A. being thus struck *languerat a duodeci-*

So where it was, that *quodam gladio percussit*, but the time, not specified, nor the place, and for this and other exceptions the indictment was quashed. Bulf. 204. Pasch. 10. Jac. Anon. * S. P. Ibid. in an anonymous case there.

mo die Febr. usque ad 13 diem Febr. so that the word (*a*) excludes the 12th day, and (*usque ad*) excludes the 13th day, and so no day at all.—3. *Quo quidem 13 die Februarii inter horas quartam & quintam obiit*, which was said to be insufficient, being an impossibility.—As to the 3d Yelverton said, that there ought to be a perfect hour between them, being laid to inter horas &c. ejusdem diei, and that it is not good. Williams J. held, that in case of indictments such exception is not allowable as to the uncertainty of the hour, tho' otherwise in case of appeals by the statute of Gloucester 6 E. 1. cap. 9. so that the exception as to the hour is not good. Croke J. held, that by the words (inter horas) there is a distinction of time denoted, as time past, and time to come, and that here it is said, that he killed him the 13th day, which cannot be as it is laid, and so it is a fault incurable.—4. Because it is said, *and so the said C. did kill and murder the said A.*—It was said by Williams J. and agreed by the whole Court, that the indictment is not good, but it ought to have concluded, *and so he killed him modo & forma prout*; and the Court held the indictment insufficient for those exceptions and quashed it. Bulf. 203. Pasch. 10 Jac. the King v. Clarke.

11. An exception was taken to an indictment, because it was *a sessione justiciariorum*, and doth not shew what session this was, and by this omission it is not certain to the Court, whether they had any authority or not. Bulf. 203. Pasch. 10 Jac. Anon.

12. So where it was, that *eo ictu instanter obiit*, it is uncertain, and the indictment not good. Ibid. 204.

The indictment was, that he gave the deceased *unam plagam mortalem circum pectus*; and excep-

13. So where it was *eo ictu dedit* to the party killed *unam plagam mortalem*, but no place [part of the body] expressed where this was, nor the * length or breadth of the wound set down. And the whole Court were clear of opinion, that for these exceptions the indictment was not good, and so they quashed it. Ibid. 204.

But where the indictment was, that he struck the deceased *in sinistra parte ventris circa umbilicum*, it was resolved per tot Cur. that the indictment was good enough; for (in sinistra parte ventris) is of itself certain and sufficient, and the words (circa umbilicum) which were an error were surplusage. But the case of Young was affirmed to be good law; for that had no certainty before the court. 4 Rep. 41. a. Trin. 41 Eliz. B. R. Walker's Case.

[526] So where the indictment laid the stroke to be *super sinistram partem lateris &c.* an exception was taken that it was uncertain by not shewing in what part. But the Court held it to be certain enough; for *latus* is a place known. Cro. J. 95. Mich. 3 Jac. B. R. Hall's Case.

* Whether it was that the *died de diversis plagis*, but does not shew of what length or breadth the wounds were, nor of which of the wounds she died, and so it is uncertain, and cannot be known whether the wounds were mortal or not, the indictment was quashed. Sty. 76. Hill. 23 Car. the King v. Savage.—See pl. 5.

14. In an indictment of manslaughter the words *ex malitia sua præcogitata*, which were in a former indictment of murder,

der, *must be omitted.* Roll. R. 407. Trin. 14 Jac. B. R. the King v. Sir M. Carew & al.

15. The indictment was, that the defendant *apud W. in com. S. insultum fecit & quod ibidem habuit & tenuit a certain sword in his right hand and prædict. the deceased percussit*, and does not say, *ibidem percussit*, and therefore naught; for it is not a necessary intendment that the percussion was at the same place; and the indictment further was, *whercof instanter obiit* which is not certain but *argumentative only*, that he died in the same place; and for these reasons, and because it was body for body the indictment was * sufficient. Het. 35. Mich. 3 Car. Gooderidge's Case.

* So it is in the original, but seems misprinted, for (insufficient.)

16. The indictment did *not shew on what part of the body particularly the person was wounded*, but says only generally, that it was *upon the hinder parts of her body*; the indictment was quashed. Sty. 76. Hill. 23 Car. The King v. Savage.

17. In an indictment of manslaughter it is necessary to say, that he did it *voluntarily*; tho' if the fact be found it shall be intended to be done voluntarily by reason of man's being a free agent, so that what he does must be intended to be done voluntarily if the contrary does not appear. 12 Mod. 628. Hill. 13 W. 3. by Holt Ch. J. in delivering the opinion of the Court in the Case of the King v. Plummer.

(X) Bill found and *Verdict.* How, and Proceedings and Judgments.

1. **I**F a man is *arraigned of murder* and *found not guilty*, but that he is guilty of homicide or manslaughter of the same person, he shall be hanged; for this is a good verdict; for in murder is comprised manslaughter, and so it was adjudged in B. R. and in a case in the marches of Wales, which was agreed by all the justices in the time of H. 8. Br. Corone, pl. 221.

2. Upon an indictment of murder *against A. and B.* the grand jury found *billa vera as to A. and manslaughter as to B.* and Coke Ch. J. said, that this is possible so to be, and it may be good; and it was so held per tot. Cur. And Coke said, that the best way is to *have a new indictment against B. and this to be for manslaughter*; for this finding of the jury cannot be so indorsed upon this indictment, and it is best to have several *indictments* against them; Doderidge J. said that in one indictment this may be specially so set down and well enough; Coke and the rest of the Judges said, that they could not proceed against B. upon this indorsement, but upon a new indictment, and a rule of Court was made to draw a new indictment against B. and he was bailed. 3 Bull. 206. Trin. 14 Jac. The King v. Cary.

Roll. R. 407. S. C. & P. and that the course is to make a new indictment upon such finding, and to leave out the words *ex malicia sua præcogitata* in the new indictment.

3. It has been adjudged that if the jury on an indictment, or appeal of murder, *find the defendant guilty of manslaughter without saying any thing expressly as to the murder*, it is insufficient and void, as being only a verdict for part; and serjeant Hawkins says, quære if the law be not the same where the jury upon such an indictment, *find that the defendant killed the deceased se defendendo, or per infortunium, and do not expressly find that he did not murder him*, according to the generality of the ancient authorities. 2 Hawk. Pl. C, 440. cap. 47. §. 5.

(Y) Tried; where.

It is said by some that the death of one who died in one county of the wound given in another, was not indictable at all at common law, because the offence was not compleat in either county, and the jury could inquire only of what happened in their own county. But it has been holden by others, that if the corps were carried into the county where the stroke was given, the whole might be inquired of by a jury of the same county; and it is agreed, that an appeal might be brought in either county, and the fact tried by a jury returned jointly from each; and at this day by force of 2 & 3 Ed. 6. 24. the whole is triable by a jury of the county wherein the death shall happen on an indictment found, or appeal brought, in the same county. Hawk. Pl. C. 79, 80. cap. 31. S. 13.

[For more of Murder in general, see Accessary, Appeal, and other proper Titles.]

Mute.

(A) Punishment thereof by Paine fort et dure, or otherwise in what Cases, by the Common Law, or by Statute Westm. 1. 3 E. 1. cap. 12.

* This Statute extends not to Treason which is

1. *Westm. 1. 3 E. 1. cap. 12. Provides that notorious felons, and which † openly be of evil name and † will not put themselves in enquests of felonies that men charge them with*

*with before the justices || at the King's suit shall have ** strong and hard imprisonment, as they which refuse to stand to the common law of the land. But this is not to be understood of such prisoners as be taken of †† light suspicion.*

the highest offence, nor to ¶¶ petit larceny, which is of all felonies

the lowest; but it extends to & women as well as to men, and so it appears by divers ancient and late precedents, and to that end is the general word felon used. 2 Inst. 177.—¶ Portman Ch. J. said that in his time all the justices agreed, that he who stands *mute in case of treason* shall not be put to penance, and therefore it seems that he shall be drawn and hanged. Br. Pain, pl. 19.—Serjeant Hawkins says, it is clearly settled at this day, that standing mute upon arraignment of high treason is equivalent to a conviction by verdict, or confession, and consequently subjects the criminals to the same kind of judgment and execution, as such a conviction would do. 2 Hawk. Pl. C. 329. cap. 30. S. 9.—S. P. Co. Litt. 391. a.—S. P. D. 205. pl. 4. Mich. 3 & Eliz.—S. P. Jenk. 223. pl. 81.—¶¶ If a man appear to stand obstinately mute in petit larceny, he shall have the like judgment &c. as if he had confessed the indictment. 2 Hawk. Pl. C. 329. cap. 30. S. 10.—† S. P. 2 Hawk. Pl. C. 331. cap. 30. S. 17.

† The *matter must be evident or probable*, which it is the judges duty to look unto. 2 Inst. 177.—S. P. cited by Serjeant Hawkins, and that Sir William Staundford says, that there ought to be evident or probable matter to convince the party of the crime whereof he is arraigned, or otherwise that he be a notorious felon, or openly of bad fame, and there- [528] fore he advises the judge, for the satisfaction of his statute and discharge of his duty, to examine the evidence which proves the prisoner guilty of the fact before he proceed to the judgment of pain fort et dure; yet the serjeant says he cannot find any book which takes notice of any examination of this kind, or of any entry, that the defendant appeared to be a notorious felon before such judgment given against him upon his standing mute, whether upon an indictment or appeal, but all the books cited [there] in the margin seem to intimate, that the standing mute is of itself a sufficient ground for such judgment; yet all that can be inferred from thence seems to be this, that it is not necessary to make any thing of this kind part of the record, it being a matter left to the discretion and conscience of the judge, and to be presumed where it is not expressed. But as to all capital appeals whatsoever, and all indictments and appeals of petit treason, perhaps it may be said, that not being within this statute, but remaining as they were at common law, the obstinacy criminal in standing mute to them may be of itself without more a sufficient inducement to a judge to award him to his penance; but considering those appeals and indictments are within the same reason with those mentioned in the statute, and it is uncertain how the common law stood in relation to these matters, as appears by the best authors differing among themselves concerning them, and seeing the method prescribed by the statute is very just and equitable, it seems prudent at least in the judge to observe the same rules in all cases of this kind. 2 Hawk. Pl. C. 330. cap. 30. S. 14.

‡ The act speaks only of indictments at the suit of the King; but the judgment of pain fort & dure was at the common law, both in appeals and indictments. 2 Inst. 177.

|| This act extends not to the suit of the party by * appeal, because as said before the judgment of pain fort & dure was at the common law both in appeal and indictment.—* S. P. Jenk. 223. pl. 81.

** Some hold from these words, that the punishment of pain fort & dure was given by this act; others held that at the common law for felony the prisoner standing mute should upon a nihil dicit be hanged, as at this day it is in case of high treason, and as they say, in case of appeal; others held, that at common law in favour of life, he should neither have pain fort & dure, nor have judgment to be hang'd, but to be remanded to prison until he would answer. 2 Inst. 178. But in answer thereto Lord Coke, after describing the severity of the punishment, observes, that the party upon the matter dies three manner of ways, viz. onere, fame, and frigore; by weight, famine, and cold; and that the reason of this terrible judgment is given by the statute, viz. Because he refuses to stand to the common law of the land, i. e. lawful and due trial according to law, and therefore his punishment is more severe, lasting and grievous without comparison than it should have been for the offence of felony itself; and the felony itself cannot be adjudged without answer; and denies all those other opinions. And as to the first he holds that this punishment was not first inflicted by this act; for that no Court or Judges could upon those words (have strong and hard imprisonment) frame such a judgment consisting of so many divers particulars; and hence it necessarily follows that this punishment, because it was to be done in prison, was before this act, but sufficiently signified (as ever since it hath been) by those two epithets *fort & dure*; so as this act setteth forth the quality of this judgment, and not the judgment itself. 2d. This act describes what persons shall be punished by pain fort & dure, viz. notorious felons, and which are openly of ill fame, but sets not down (as has been said) what the punishment is, but provides that it shall not be for light suspicion. 3d. All books that held with great authority, that in case of appeal the prisoner standing mute shall have judgment of pain fort & dure, to prove that such judgment was before the making this act; for this statute extends not to appeals, which are the suit of the subject, but only to the suit of the King, which is by way of indictment; and herein the

words of *Fleta* are very remarkable, *si autem appellatus nihil respondere velit &c. &c. Appellatus inde petierit iudicium, indejensus remanebit, morti tamen non condemnabitur, sed gaoia committetur &c.* and there sets down the penance, which of necessity must be at the common law; and herewith agreeth *Britton*, who wrote soon after this act; so as the penance in case of appeal is both by ancient and sound authority. And as to the second opinion, the answer to the first answers this also, and if he should be hang'd by the common law, this statute does not take it away, but ordains, that he should have strong and hard imprisonment, and therefore that a felon standing mute may according to their opinions be hang'd at this day is contrary to all the books and constant and continual experience. As to the third, it would be entertaining too mean an opinion of the common law should it so far encourage felons that they by their contumacy against it should suffer one of the lowest punishments, viz. imprisonment till they would answer; and the answer to the first opinion is likewise so to this. 2 Inst. 178, 179.

†† Se jeant Hawkins says, that he does not find it said in any book, what shall be done to a person who obstinately standing mute to an arraignment shall appear to be charged upon very light suspicion; but says he takes it for granted, that he may be severely fined and imprisoned for the contempt. 2 Hawk. Pl. C. 330. cap. 30. S. 15.

Br. Corone. 2. In appeal at the suit of the party, the defendant stood
pl. 43. cites mute, and it was found by inquest that it was for malice,
S. C. but if by which he was hanged pro non defendendo, and not put
it had been to penance; quod nota; quære. Br. Pain, pl. 8. cites 21 E.
at the suit of the King 3. 18.
he should have been

put to penance; quod nota diversity between appeal and arraignment upon indictment at the suit of the King.—Br. Appeal, pl. 40. cites S. C. acc.

In appeal of death the defendant was taken, and would not speak; by which inquest of office was taken and charged if he could speak the same day, who said that he could; by which he was put to penance; quod nota; as at the suit of the King. Br. Pain. pl. 13. cites 43 Aff. 30.—Br. Corone. pl. 123. cites S. C.—So in appeal of robbery. Br. Appeal, pl. 24. cites 8 H. 4. 1. 2.

It is holden by Sir Matthew Hale that an appellee of felony standing mute shall not have judgment of penance, but to be hang'd, but this is made a quære in Staundford and Brooke, and the contrary opinion seems to be favour'd by Sir Edward Coke, and is expressly holden by Ke-
[529] llynge and supported by several resolutions in the Old Books, whereas the Year Book of 21 E. 3. seems to be the only resolution in favour of the other side; to which it may be answered, not only that three of the above resolutions to the contrary are much later, but also that the appellee in this case appears to have been taken with the manner, which probably might be a circumstance of considerable weight in the judgment. 2 Hawk. Pl. C. 329. cap. 32. S. 12.

* Br. Corone. 3. If an * appellor or † approver stands mute he shall be hang'd.
pl. 99. Br. Pain. pl. 12. cites 26 Aff. 19.
cites S. C.

—† S. P. Br. Corone, pl. 22. cites 8 H. 4. 3. by reason of the confession of the felony before.

Br. Corone, 4. If a man abjures the realm, and after is taken and arraign-
pl. 99. cites ed and stands mute, he shall be put to penance. Br. Pain, pl.
S. C. acc.— 12. cites 26 Aff. 19.
But Br. Pain, pl. 2.

cites 8 H. 4. 3. contra, that he shall not be put to penance, but shall be hang'd; for he was attainted of felony before by his confession.—Br. Corone, pl. 22. cites S. C.

5. See pain of the felon for refusing of the law, and for not concluding of his plea of not guilty ad patriam; for when it was demanded of him how he would be tried, he said that he would be tried by God, Saint Mary, and Holy Church, and not otherwise, and therefore he was put to penance. Br. Pain, pl. 14. cites 4 E. 4. 11. and * 7 E. 4. 29. accordingly; for if he will not conclude his plea, et de hoc ponit se super patriam, he shall be put to penance.

* Br. Corone, pl. 148. cites S. C.

6. *In appeal* the defendant pleaded *not guilty and would not put himself upon the country*, and therefore he was put to penance, as well as if he had been arraigned at the suit of the King; quod nota. Br. Pain, pl. 15. cites 14 E. 4. 7.

Br. Peremptory, pl. 86. cites S. C.

7. J. N. was arraigned of certain felony and of making money, who pleaded to all *not guilty*, and upon this ven. fac. was awarded returnable immediate, and the said J. N. *challenged peremptorily 31 jurors*, by which the jury remained for default of jurors, and 40 tales were returned 2 days after, and the jury appeared, and he was commanded to keep his challenge, and would not speak, by which 12 men were charged upon him, and found him guilty, wherefore he was hang'd, because he pleaded not guilty before; quod nota bene. Br. Corone, pl. 51, cites 15 E. 4. 33.

Br. Pain, pl. 9. cites S. C.

8. If a man *challenges above 36 jurors in appeal*, he shall be put to penance, by all the justices; Keble e contra, and that the statute of Westm. 1. cap. 12. Mention at the suit of the King. Br. Pain, pl. 4. cites 3 H. 7. 2.

Br. Pain, pl. 5. cites 3 H. 7. 12. contra, that he shall be hang'd and

not put to penance; quod nota; by the justices of both benches.—Serjeant Hawkins says this point seems to be holden in the second institute and also in the latter part of Sir Matthew Hale's Pleas of the Crown, but says this very point is made a quære in another part of Hale's Pleas of the Crown, and also in Kelynge, and the contrary is holden in the third institute; neither does it seem easy to assign a reason, why he who challenges more jurors than he ought, shall, in respect of an implied refusal of a legal trial, be thought worthy of a greater punishment than he who obstinately, directly and expressly refuses it; to which may be added that the seems to be but one full authority in the Old Books for the maintenance of this opinion [which is this of 3 H. 7. 12.] whereas there is a great number of the other side. 2 Hawk. Pl. C. 327. cap. 30. S. 3.

9. T, being indicted for robbery refused to plead, and his *two thumbs were tied together with whipcord* that the pain of that might compel him to plead, and he was sent away so ty'd and the minister prevailed on to go to him to persuade him; and an hour after he was brought again and pleaded. And this was said to be the constant practice at Newgate. Kel. 27. 14 Octob, 14 Car. 2. Thorely's Case.

S. C. cited 2 Hawk. Pl. C. 331. cap. 30. S. 18. And Serjeant Hawkins says it is said to be the constant practice not

to proceed to the judgment and penance before all methods of persuading him to plead are found ineffectual.

(B) The Manner of the Punishment by Pain [530] fort et dure.

1. **A** PPEAL at Newgate before the justices of gaol-delivery, the defendant pleaded not guilty, and would not put himself upon the county, by which he was put to penance, and the judgment was, that he shall be *remanded to the prison* where he was before, and after he *shall be put into a chamber*, and there shall be *naked without litter, rushes or cloaths*, or other thing but the bare ground, and then he *shall be laid upon his back, naked without any thing about him, saving a cloth to cover his members*, and that his *head and his feet be covered*, and that

Br. Appeal, pl. 24. cites 8 H. 4. 1, 2. — 4 Inst. 178. is that their head and feet be uncovered.— || Orig. (Vest.) — ¶ So that their heads touch not

the ground, and that they have no sustenance but rye bread &c. Per Fromwicke Ch. J. Keilw. 70. pl. 4.—Serjeant Hawkins says, that the manner of inflicting this punishment may be best found from the books of Entries and other law books, all of which generally agree, that the prisoner shall be remanded to the place from whence he came, and put into some low dark room, and there laid on his back without any manner of covering except for the privy parts, and that as many weights be laid upon him as he can bear and more, and that he shall have no manner of sustenance but the worst bread and water, and that he shall not eat the same day in which he drinks, nor drink the same day on which he eats, and that he shall so continue till he die. But that it is said that anciently the judgment was not that he should so continue until he should die, but until he should answer, and that he might save himself from the penance by putting himself upon his trial, which he cannot do at this day after the judgment of penance once given. 2 Hawk. Pl. C. 330. cap. 30. §. 16.—And there in the margin, the serjeant, as to the (*remanding him to the place whence he came*) cites H. P. C. 227. S. P. C. 150. (E) Keilw. 70. a. 4 E. 4. 11. pl. 18. 14 E. 4. 8. pl. 17. Abr. Br. Corone. 160. 2 Inst. 178. Ra. Ent. 385. pl. 17. 8 H. 4. 1. pl. 2.—And as to the words (*in some low dark room*). He says, that this clause is omitted in Keilw. 70. a. 4 E. 4. 11. pl. 18. But is mentioned in all the other books above cited, but with this difference, that 14 E. 4. 11. pl. 17. says only that he shall be put in a chamber, without adding that it shall be low or dark.—And as to the words (*there laid on his back &c.*) He says, that in this all the books above cited seem to agree. And 14 E. 4. 8. pl. 17. and S. P. C. 150. (E) and 2 Inst. 178. add, that he shall lie without any litter or other thing under him, and that one arm shall be drawn to one quarter of the room with a cord, and the other to another, and that his feet shall be used in the same manner. But that these clauses are wholly omitted in all the other books above cited except H. P. C. which takes notice of the latter of them only. And Ra. Ent. 385. pl. 2. adds, that an hole shall be made for the head. And Keilw. 70. a. says, that the head shall not touch the earth; but none of the other mention either of these clauses.—And as to the words (*that as many weights shall be laid upon him as he can bear and more &c.*) He says, that in this all the books above cited agree.—And as to the word (*bread*) he says, that in 14 E. 4. 8. pl. 17. S. P. C. 150. (E) and 2 Inst. 178. are, that he shall have three morsels of barley bread a day. Keilw. 70. a. that he shall have only rye bread, and Ra. Ent. 385. pl. 2. and 2 H. 4. 1. pl. 2. generally that he shall have of the worst bread.—And as to the word (*water*) he says, that in 14 E. 4. 8. pl. 17. S. P. C. 150. (E) 2 Inst. 178. & 8 H. 4. 1. pl. 2. & Keilw. 70. a. are, that he shall have the water next the prison so that it be not current; but Ra. Ent. 385. pl. 5. is general, that he shall have the worst water.—And as to the words (*not eat the same day in which he drinks, nor drink the same day on which he eats &c.*) he says, this is omitted in Keilw. 70. a. and in 8 H. 4. 1. pl. 2.—And as to the words (*till he die*) he says, this is omitted in none of the books above cited, except 14 E. 4. 11. & H. P. C. 227. but that neither of those books give the whole judgment at large. Hawk. Pl. C. 330, 331. cap. 30.—* This seems to be misprinted and should be 4.

[531] (C) Punishment avoided by pleading, at what Time.

But we have had a late instance of one who was actually under this punishment of paine fort & dure, and yet afterwards admitted to plead. 3 R. S. L. 199.

1. *A*nciently the judgment was not that he should be pressed till he died, but until he should answer; and he might save himself from the penance by putting himself on his trial, which he cannot do at this day after the judgment of penance is once given. 2 Hawk. Pl. C. 331. cap. 30. §. 16.

(D) *First*

(D) *What shall be said to be standing Mute.*

1. **WHERE** a man *pleads not guilty, and after stands mute before trial*, it is as if no answer had been given. Br. Pain, pl. 2. cites 8 H. 4. 3.

2. *Contrary upon confession*; for this countervails verdict. Ib.

It seems clear that after a man

hath confess'd himself guilty, or *pleaded, and put himself upon his country, he shall not afterwards be demeaned as one that stands mute, in respect of his subsequent silence; but the jury shall be charged, and the trial shall proceed, and the like judgment shall be given as in common cases. 2 Hawk. Pl. C. 327. cap. 30. S. 4. — * Kel. 36. S. P.

3. A man may stand mute two manner of ways; first, when he stands mute *without speaking of any thing*, and then it shall be inquired, whether he stood mute *of malice or by the act of God*; and if it be found that it was by the act of God, then the judges of the Court (who are ever to be of council with the prisoner to give him law and justice) ex officio ought to inquire whether he be the same person and of all other pleas which he might have pleaded, if he had not stood mute. 2 Inst. 177, 178.

4. And note well the abovesaid words of our books; [whether of malice or by the act of God] for it may be, the prisoner in truth cannot speak, and yet being not mute by the act of God he shall be forthwith put to his penance; as if the *delinquent cut out his own tongue* and thereby become mute. 2 Inst. 178.

5. Another kind of mute is, when the prisoner can speak, and perhaps *pleads not guilty* or pleads a plea in law, *and will not conclude to the inquest* according to the act of 3 E. 1. cap. 12. or speaks much, but *does not directly answer &c.* for idem est nihil dicere & insufficienter dicere: to be short, when in the end he will not put himself upon the inquest; that is, De bono & malo to be tried by God and the country, then that act is sufficient warrant, if the cause be evident or probable, to put him to his penance; but if he **demurs in law*, and it be adjudged against him he shall have judgment to be hanged: and tho' by his demurrer he refuse to put himself upon the inquest according to the letter of that act, yet forasmuch as he is out of the reason of that act, for that he refuseth not the trial of the common law, the demurrer being allowed to him by law, and to be tried by the judges, he shall not be put to his penance, but have judgment to be hanged. 2 Inst. 178.

He who answers impertinently or ineffectually, or refuses to put himself upon his trial as the law directs, may as properly be said to stand mute, as he who makes no answer at all; as

where a man *refuses to plead a plea in chief, or the general issue*, but insists on some frivolous defence, or even to plead a good dilatory plea, and refuses to plead over to the felony, in which case, after such a plea is found against him, he shall not be admitted to plead in chief, but shall be adjudged to his penance in the same manner as if he had made no plea at all. And so shall he be who *pleads a good plea in chief or the general issue, but refuseth to put himself upon the inquest*, (that is, to be tried by God and his country if a commoner, or by God and his peers if a lord) or to wage battle where such trial is allowed. 2 Hawk. Pl. C. 326. cap. 30. S. 1.

* It is clear, that he who *demurs in law* to an indictment or appeal shall not be esteemed to stand mute, nor to be dealt with as such, as having refused a trial by his country; for he puts himself upon a trial by the Court which is the proper trial of a matter in law. 2 Hawk. Pl. C. 327. cap. 30. S. 3.

(E) *Inquiry*

(E) *Inquiry thereon. In what Cases, and of what, by what Jury, and How.*

Br. Appeal,
pl. 24. cites
S. C.

1. **T**HE defendant in appeal stood mute, and it was *inquired* by inquest of the marshal's servants and others, the time *when he spoke*, and *if he was mute for malice to delay death, or by act of God*, and *if the goods were the plaintiff's at the time of the robbery*, and *if he was taken at the fresh suit of the plaintiff*, and all found against the thief. And therefore he was adjudged to penance to be pressed to death, and the plaintiff restored. Br. Pain, pl. 1. cites 8 H. 4. 1.

But if a felon pleads not guilty, and the justices respite the execution for cause &c.

and after he

is brought before them, if he stands mute it shall not be inquired of him, but if he has matter to discharge the execution he ought to plead it at his peril. Ibid.

And the diversity is, because he has been always in their prison, so that it appears that he is the same person who was attainted; but *contra* of a man abjur'd or outlaw'd, and therefore he may say that he is not the same person; for it may be that another person is taken for him. Ibid.

3. It seems agreed, that were a prisoner stands wholly mute *without making any answer at all*, the Court shall take an *inquest of office* by the oath of *any 12 persons that happen to be present*, *whether he do so of malice or by the act of God*. But after an issue has been joined, if the prisoner stand mute when the *jury are in Court*, if there be any need for such inquiry, it shall be made by them and not by an inquest of office. 2 Hawk. Pl. C. 327. cap. 30. S. 5.

4. Where a man *answers, but not effectually*, it seems needless to make any inquiry whether his refusal be owing to his malice or not, because it is apparent. 2 Hawk. Pl. C. 327. cap. 30. S. 6.

5. Where one stand mute *by the act of God*, the judges of the Court (who are always to be of counsel with the prisoner to see that he have law and justice) shall not only cause the *felony* to be inquired of, but *also whether the prisoner be the same person*, and all other matters which he might have pleaded in his defence. And the serjeant says such inquiry shall be made as he supposes, *not by an inquest of office, but by a jury returned by the sheriff*, in the same manner as if the defendant had actually pleaded: for since it is no ways his fault that he did not so plead, there is no reason why his trial should be in a more loose or summary manner, or any way less regular or solemn than if he had. To which may be added, that Sir Matthew Hale says, "that the felony shall be inquired of &c. in the same manner as if the prisoner had pleaded not guilty"

From

From which words it seems plain, the inquiry ought to be by an inquest returned by the sheriff, as in other trials at the mise of the parties, because if the defendant had pleaded it must certainly have been so. And therefore it seems reasonable, that where Sir William Stamforde having spoken of such inquiry adds immediately, that it is but an inquest of office, ought to be understood not of the inquiry of the felony whereof he had last spoken, but of the inquiry whether the prisoner stood mute of malice or by the act of God, whereof he had spoken in the sentence next before. And I the rather incline to think that this is his meaning, because the books cited by him to this point relate to this inquiry only. 2 Hawk. Pl. C. 327, 328. cap. 30. S. 7.

6. It seems to be settled at this day, that where one who is attainted either by judgment on a verdict, or confession, or by outlawry, or abjuration, stands *mute to the demand why execution should not go against him*, he shall not be awarded to his penance but to the same kind of execution, if any, that would have been awarded if he had stood mute; yet there seems to be this *difference*, that where *one who has always continued in prison after an attainder* by verdict or confession, stands mute to the demand why execution should not go, it shall be awarded against him without any inquiry whether he stands mute by malice or otherwise, or whether he be the same person who is so attainted or not, because it sufficiently appears that he is the same person, and that is sufficient to justify an award of execution against him, where nothing appears to the contrary. 2 Hawk. Pl. C. 328. cap. 30. S. 8.

But if a person so attainted be retaken after an escape or [533] if one be taken on an outlawry or abjuration, and stand mute to the demand why execution should not go against him, it shall be inquired whether he

stand mute of malice or of the act of God; and if it be found of malice, it seems that execution shall be awarded without any farther inquiry; but if it be found to be the act of God, it seems that it ought also to be inquired whether he be the same person or not, in the same manner as where one stands mute by the act of God when first brought upon his trial. 2 Hawk. Pl. C. 328. cap. 30. S. 8.

* A felon, that had pleaded to issue and abjur'd, shew'd for cause why execution should not go against him, that he was *drawn out of the church of B. and pray'd to be restored*; the King's Attorney travers'd it, and at the return of venire facias he stood mute, and was hang'd; but first it was inquired if he was drawn out of sanctuary, who said that he was not, and then the same inquest inquired of the covin which was found. Br. Corone, pl. 22. cites 8 H. 4. 2.

(F) Forfeiture, and Pleadings.

1. A Felon, who stood mute and was put to penance, had goods of his own, which were claimed by J. S. by grant of the King as forfeited; and it was agreed that *whoever has the forfeiture, yet the goods shall be brought into B. R. and shall be claimed and delivered to the party*. Br. Appeal, pl. 24 cites 8 H. 4. 1, 2.

The goods so forfeited ought not to be delivered to any person claiming them under a grant from the crown.

till he has shewed a good title to them in the King's Court by some grant sufficient to pass them 2 Hawk. Pl. C. 331. cap. 30. S. 20. cites 8 H. 4.

2. He

There is no doubt, that in cases of high treason he shall forfeit both 2. He that stands mute *forfeits* no lands, but goods, chattels, leases, and debts, except his offence be *treason*, and then he forfeits his lands to the Crown. Bacon's Use of the Law. 32.

lands and goods in the same manner as if he had been attainted any other way; also Serjeant Hawkins took it for granted, that in the case of *felony and petit treason*, where a person by standing mute shall not avoid being attainted for such crimes, he shall forfeit his lands and goods in the same manner as on other attainders. But where-ever a person standing mute is adjudged to his *penance*, and thereby prevents that attainder which otherwise he might have incurred, it seems agreed, that he * forfeits his chattels only, and not his lands. 2 Hawk. Pl. C. 331. cap. 30. S. 19.—The book cites H. P. C. 226. Savil. 56. pl. 121. Kely. 57. D. 205. pl. 4. Inst. 177, 178. Br. Pain. 19. Co. Litt. 391. 3 Inst. 14. S. P. C. 150. (C) Fitz. Coro. 283. 18 E. 3. 26. S. P. C. 150. (D) S. P. C. 250. (D)——* S. P. Br. Appeal, pl. 101. cites 14 E. 4. 7. for the lands are saved to the heir.—So if he challenges above 36 jurors in appeal, he shall be put to penance, and not forfeit his lands; by all the justices except Keble. For he said, that the statute of W. 1. cap. 12. is at the suit of the King. Br. Appeal, pl. 82. cites 3 H. 7. 2.—Br. Paine, pl. 4. cites S. C.

[For more of Mute in general, see Accessary and other proper Titles.]

(A) Necessity. Of what Things it may be an Excuse.

Lex necessitatis est lex temporis, scilicet instantia. And necessitas legum vincula irridet. Hob. 159.—2 Bull. 61.—10 Rep. 51.—Jenk. 19. pl. 35. 207. pl. 38. 280. pl. 5.—1 Lev. 4. in case of Manby v. Scott. 1. *Id quod alias licitum non est, necessitas facit licitum & necessitas inducit privilegium, quod jure privatur.* Bridg. 30. cites Bracton.

2. The law charges no man with default where the act is compulsory, and not voluntary, and where there is not a consent and election; and therefore if either there be an impossibility for a man to do otherwise, or so great a perturbation of the judgment and reason, as in presumption of law man's nature cannot overcome, such necessity carries a privilege in it self. Bac. Elem. 25.

3. Necessity is of three sorts, necessity of conservation of life, necessity of obedience, and necessity of the act of God or of a stranger. Ibid.

4. And

4. And 1st. of conservation of life, if a man *steals viands to satisfy his present hunger*, this is no felony nor larceny. *Ibid.* S. P. But if such his necessity be owing to his unthrifti-

ness, surely it is far from being an excuse. Hawk. Pl. C. 93. chap. 23. S. 20.—So if divers be in danger of drowning by the casting away of some boat or barge, and one of them get to some plank, or on the boat's side, to keep himself above water, and another to save his life thrusts him from it, whereby he is drowned, this is neither *se defendendo*, nor by misadventure, but justifiable. *Ibid.* —S. P. Hawk. Pl. C. 73. cap. 28. S. 26.

So if divers felons be in a gaol, and the gaol by casualty is set on fire, whereby the prisoners get forth, this is no escape nor breaking of the prison. Bac. Elem. 25.

So upon the statute, that every merchant that setteth his merchandize on land without satisfying the customer or agreeing for it, (which agreement is construed to be in certainty) shall forfeit his merchandize, and it is so that by tempest a greater quantity of the merchandize is thrown over-board, whereby the merchant agrees with the customer by estimation, which falls out short of the truth, yet the over quantity is not forfeited; where note, that necessity dispenses with the direct letter of a statute law. *Ibid.* & 26.

So if a man have right to land, and do not make his entry for terror of force, the law allows him a continual claim, which shall be as beneficial unto him as any entry. *Ibid.* 26.

So shall a man save his default of appearance by *cretain de eau*, and avoid his debt by *durese*, whereof you shall find proper cases elsewhere. *Ibid.*

5. The second necessity is of obedience; and therefore where baron and feme commit a felony, the feme can neither be principal or accessory, because the law intends her to have no will in regard of the subjection and obedience she owes to her husband *Ibid.* So one reason among others, why ambassadors are used to be excused of practices

against the state (where they reside, except it be in point of conspiracy, which is against the law of nations and society) is, because non constat whether they have it mandatis, and then they are excused by necessity of obedience. *Ibid.*

So if a warrant or precept come from the King to fell wood upon the ground whereof I am tenant for life or for years, I am excused in waste. *Ibid.*

6. The third necessity is of the act of God or of a stranger; as if I be particular tenant for years of a house, and it be overthrown by grand tempest, or thunder and lightning, or by sudden floods, or by invasion of enemies, or if I have belonging to it some cottage which has been infected, whereby I can procure none to inhabit them, nor workman to repair them, and so they fall down, in all these cases I am excused in waste; but of this last learning when and how the act of God, and strangers do excuse, there be other particular rules. Bac. Elem. 26, 27.

7. It is to be noted that necessity privileges only *quoad jura privata*; for in all cases if the act that should deliver a man out of the necessity be against the commonwealth, necessity excuses not; for *privilegium non valet contra rempublicam*; and as another says, *necessitas publica major est quam privata*; for death is the last and farthest point of particular necessity, and the law imposes it upon every subject, that he prefer the urgent service of his prince and country before the safety of his life; as if in danger of tempest those, that are in the ship, throw over other men's goods, they are not answerable; but if a man be commanded to bring ordinance or munition to relieve any of the King's towns that are distressed, then he cannot for any danger of

of tempest justify the throwing of them overboard; for there it holds which was spoken by the Roman, when he alledged the same necessity of weather to hold him from embarking, *necesse est ut eam, non ut vivam*. So in the case put before of *husband and wife*, if they join in committing treason, the necessity of obedience does not excuse the offence, as it does in felony; because it is against the commonwealth. Bac. Elem. 27.

8. So if a fire be taken in a street, I may justify the pulling down of the wall or house of another man to save the row from the spreading of the fire; but if I be assailed in my house in a city or town, and distressed, and to save my life I set fire on mine own house, which spreads and takes hold of other houses adjoining, this is not justifiable, but I am subject to their action upon the case, because I cannot rescue mine own life by doing any thing which is against the commonwealth; but if it had been but a private trespass, as the going over another's ground, or the breaking of his inclosure when I am pursued for the safeguard of my life, it is justifiable. Bac. Elem. 27, 28.

9. The common case proves this exception, that is, if a mad man commit a felony, he shall not lose his life for it, because his infirmity came by the act of God; but if a drunken man commit a felony, he shall not be excused, because his imperfection came by his own default; for the reason and loss of deprivation of will, and election by necessity, and by infirmity, is all one; for the lack of arbitrium solutum is the matter; and therefore as infirmitas culpabilis excuses not, no more does necessitas culpabilis, Bac. Elem. 29.

10. Necessity is a good excuse in a cessavit; as where the lords brought cessavit against their tenants in Westmorland and Northumberland, they were excused for the payment of their rents and services, because by their war with the Scots the lands were laid waste, and they themselves impoverished, so that they could not manure their lands to raise their rents. 2 Roll. R. 116. in Case of the King v. Cusack.—Cites 7 E. 3.

11. If by the custom of a vill the bailiffs are to have 2d. for every hide, of every beast killed in the vill, and for non-payment they distrain a hide and tann it, and convert it to leather, as of necessity to prevent rotting, yet it is no excuse in trespass; because if it did rot the owner must bear the loss, and the bailiffs may have action of debt for the 2d. Cro. E. 783. Mich. 42 & 43 Eliz. B. R. Duncon v. Reeve.

2 Bull. 287.
S. C. cited
per Coke
Ch. J. in
the case of
Bird v. All-

12. Flinging goods overboard for preservation of the lives of the passengers in a barge, one of whom had a pack with money in it, is justifiable. Roll. R. 79. the case of Gravesend barge.

cock — — If the danger was from overloading the barge by the ferryman, he is chargeable to the owners; but not if there was no sur-charge. 12 Rep. 62. S. C. — 1 Lev. 4. — Jenk. 163. pl. 16. — Per Roll Ch. J. Allen. 93. cites Bearcroft's Case contra.

13. In action of debt upon bond for appearance at a certain day, *imprisonment* is no plea. Per Doderidge and Haughton J. 2 Roll. R. 136. Mich. 17 Jac. B. R. Anon.

14. A man shall *not* in any case *justify the killing another by a pretence of necessity*, unless he were himself wholly without fault in bringing that necessity upon himself; for if a man, in defence of an injury done by himself, kill any person whatsoever, he is guilty of manslaughter at least; as where divers rioters wrongfully detain a house by force, and kill those who attack it from without, and endeavour to burn it. Hawk. Pl. C. 72. Chap. 28. S. 22. [536]

15. *Martial law* is not in truth and reality a law, but something *indulged rather than allowed as a law*; the necessity of government, order, and discipline in an army is that only which gives these laws a countenance; *quod enim necessitas cogit, defendit*. Hale's Hist. of the Law 39.

(B) *What Things shall be made Valid by it, which would not otherwise be so.* See Infant. Judge (A)

1. IF money due to testator on a single bond be paid to an *infant's executor, his receipt is good, propter necessitatem*, because otherwise the obligee is not bound to pay the money. And. 117. in an Anon. Case. Ibid 177 in Case of Russell v. Pratt.

2. If the *steward of a manor* marries a copyholder, and after *surrenders to himself*, yet it is good for necessity; Arg. Roll. R. 457. cites 41 Eliz. Savage's Case.

3. *Seisin to maintain assise* ought not to be of a contrary nature to the thing of which seisin is intended to be given, but in one case only, and that is where the sheriff gives seisin of a rent *by a twig, or a clod of earth*, and this is in case of necessity; for the sheriff cannot take the money out of the tenant's purse, and deliver seisin of that; per Williams J. 2 Brownl. 237. Pasch. 8 Jac. B. R. in Case of E. Rutland v. E. Shrewsbury.

4. *Inspection of infant* was on the day of adjournment of the term *propter pestem* in order to reverse a fine, and where the infant would be of full age before the day to which the term was adjourned, and it was doubted if any thing could be done the day of the adjournment, and the conusee gave 400 l. and so compounded and got a release of errors. Cro. J. 230. Mich. 7 Jac. B. R. Poynt's Case. Note, afterwards Fleming Ch. J. said, that upon conference with the justices it was resolved, that this inspection

tion was good notwithstanding the adjournment. Ibid.—He may be inspected at this day on which the adjournment is made; by all the judges of England; for if the infant, after the said day of adjournment and before the day to which the adjournment is made, attains his full age, the inspection will fail. Jenk. 317. pl. 8.—2 Brownl. 278. Mich. 7. Jac. C. B. S. C.

5. The law in cases of necessity, as of fire, burning of houses, rebellions, or thieves, that destroy deeds, allows the

proof of deeds without shewing them. Jenk. 19. pl. 35. cites 10 Rep. Leyfield's Case.

6. *Jurors upon a great tempest after evidence depart from the bar without licence of the Court, and eat and drink, and some persons before their coming back to the bar spoke to them to give their verdict for defendant, for that the right was with him; they came back and gave verdict for the plaintiff, the verdict is good.* Jenk. 187. pl. 84.

7. A contract of an *infant* for things necessary will bind him. Lat. 22 Hill. 1 Car. Stone v. Withipool.

8. The reason why a will will pass personal estate, but not lands purchased after the making the will, is, because the necessity of dealing and traffick in the world would require a man to make a new *will* every day of his *personal chattels*, if he could not dispose of them because of their having *undergone some alteration*, and this would create the greatest perplexity in the world, personal estate and chattels being transient and fleeting, and not fixt, and permanent, as lands are; and from hence it is that such wills stand good. See 11 Mod. 125. per Holt Ch. J. in delivering the opinion of the Court, Trin. 1707. 6 Ann. B. R. in Case of Brunker v. Cook.

(A) *How considered, and the Force of it.*

S. P. Arg.
Chan. Cases
115. Read
v. Read.

1. **I**T is lawful for any to *travel beyond sea*, if there be not a *ne exeat regnum* against him; per Montague and Cook J. 2 Roll. R. 12. Hill. 15 Jac. B. R. in Carter's Case.

For if particular affection by private discretion do govern publick affairs, there one man's will

2. The *ne exeat regnum* is a writ *applied to * particular persons*, and at first chiefly used in matters of state, and but in late time applied to Courts of justice, to hinder such as would avoid it; and that it ought not to be granted without oath; Arg. Skin. 136. Mich. 35 Car. 2. in Case of the East-India Company v. Sandys.

becomes every man's misery. Noy. 182. in case of Darcy v. Thomas Allen. —• Mod. 179. Arg. in case of Sands v. Child.

3. A person *in custody on a ne exeat regnum* may be brought to B. R. to be charged with an action. 12 Mod. 562. Mich. 13 W. 3. Nailor's Case.

4. A *ne exeat regnum*, is not an action as a *homine replegiando* is; per Holt Ch. J. 12 Mod. 563. Mich. 13 W. 3. in Nailor's Case.

(B) Necessary and Grantable in what Cases and How.

1. **BY** the common law every man may go out of the realm to merchandize, or on pilgrimage, or for what other cause he pleaseth, without the King's leave; and he shall not be punished for so doing; but because that every man is of right to defend the King and his realm, therefore the King at his pleasure by his writ may command a man that he go not beyond the seas, or out of the realm without licence; and if he do the contrary, he shall be punished for disobeying the King's command; and it seemeth that this command may be made by the King's writ under the great seal, and also under the * privy seal or his signet; for by the law the subject is bound to take notice of every of the King's seals in such case, as well as of the great seal. F. N. B. 85. (A)

Jenk. 82.
Pl. 70. S. P.
—P. R. C.
250. S. P.
—Curs.
Canc. S. P.
454. —
This writ,
as the name
imports, is
to restrain a
subject from
going out of
the kingdom,
and when
it was granted
on behalf of a

subject, It was formerly reckoned a writ of grace, and used to be granted at the meer pleasure of the Court on affidavit, or other matter, shewing the party designed to go out of the realm to the other party's damage; yet it was said a defendant could not have this writ on affidavit as a plaintiff might; it is said to have been settled by the late Lord Keeper Wright, that it being a remedial writ, is as such, upon due application by petition, or motion, to be granted the subject. P. R. C. 250, 251. — S. P. Lane. 29.

2. And there are two manners, or forms of such writs; one is directed unto the party, and the other unto the sheriff, commanding him that he cause the party to find security that he shall not go out of the realm without the King's licence. F. N. B. 85. (B)

P. R. C.
250. S. P.
and that the
writ was
sometimes
directed to
the sheriff

or justices of the peace, or both, but that now it is commonly directed to the sheriff only. — S. P. Curs. Canc. 455.

3. And also the King by his proclamation may inhibit his subjects, that they go not beyond the seas, or out of the realm without licence, and that without sending any writ or commandment unto his subjects; for perhaps he cannot find his subject, or know where he is, and therefore the King's proclamation is sufficient in it self; and if the subject do contrary thereunto, it is a contempt, and for so doing he shall be fined to the King. F. N. B. 85. (C)

In the notes
there (b) it
is said see
D. 165. &
[538]
Rot. Claus.
25 E. 1 M.
25. Dorso.
Lib. Parl.
204. and
note Dyer

296. accordant. But till such proclamation made or writ issued it is no contempt for any person to go beyond sea, altho' he intends to live there out of his due obedience; for his purpose or intent is not triable. F. N. B. 85. (C) in the notes there. (b).

4. A ne exeat regnum was awarded by the Court of Chancery at the suit of men in a suit *between party and party*. Toth. 233.

5. Tho' the King may prohibit any person in some cases *with some commodities* to pass out of the realm, yet this cannot be but *where the end is publick*, viz. to restrain the person, because he intends things abroad to the King's prejudice, or to restrain any merchandizes, either in time of dearth or war; for *necessitas est lex temporis*. 12 Rep. 33. Trin. 5 Jac. Case of Customs &c.

6. The writ was granted on suggestion that he was *indebted*, but on putting in security, it was *superseded*, Chan. Cases 116. 15 Car. 2. cites the case of Crisp, v. Bishop.

It was granted to the wife against her husband where she had got sentence for alienation against him in the

7. Conveying away and *making over his estate* to others; *standing out an excommunication*, and *absconding his person*, and *giving out that he intends to go beyond the seas* was assigned as *reasons for granting a ne exeat regnum*; and it was granted and ordered to stand. 2 Chan. Rep. 20. 20 Car. 2 Read v. Read.

Spiritual Court, which he refused to obey and threatened to go beyond sea; and the Court refused to supersede it. Chan. Cases 115 Mich. 20 Car. 2. Read v. Read.—2 Vent. 345. Sir Jer. Smithson's Case.

8. A writ of ne exeat regnum may be granted in any case where there is danger of subterfuge from the justice of the nation, tho' of private concernment. 2 Chan. Cases 245. Trin. 30 Car. 2. Anon.—Per Fleming Ch. B. the King may inhibit any man; for the *cause is not traversable*. Lane 29.

9. A ne exeat regnum ought not to be granted but *upon great reason* and examination, otherwise an *homine replegiando* may lie; per Holt Ch. J. Farr. 9. Pasch. 1 Ann. B. R. Anon.

10. A *solicitor's bill* being taxed and reported *overpaid 60l.* On motion, and affidavit of his going beyond sea a ne exeat regnum was granted, tho' *no bill was in Court* whereon to ground this writ; per Master of the Rolls. Ch. Prec. 171. Mich. 1701. Loyd v. Cardy.

11. A ne exeat regnum lies to prevent ones going into *Scotland*, it being out of the jurisdiction of chancery; and the process thereof not reaching thither is equally mischievous to the suitor here as if he actually went out of the kingdom; and tho' it was *moved for one defendant against another defendant*, yet it being *in a matter of account* in which both parties are *actors*, and money being sworn due from the defendant against whom to the other, Lord Harcourt thought the motion proper. Wms's Rep. 263. Trin. 1714. Done's Case.

12. Where the party is to be restrained from going to *Scotland* the *condition must be not to go out of the realm or to Scotland*; for if it be only not to go out of the realm, the party's going to Scotland will not forfeit his bond or recognizance. Wms's Rep. 263. in a note there.

13. It

13. It was moved to have a ne exeat regno framed so as to prevent the defendant going into Scotland upon affidavit of his going to reside there, and having confessed that he had received 10,000*l.* as trustee for the plaintiffs. An order was made at the Rolls and the writ marked for 10,000*l.* bail, but apprehending that the usual writ would not restrain his going into Scotland, as being now the same kingdom, and yet as much out of the reach of the process of the Court as any foreign part out of the King's allegiance, the same was moved before the Lord Chancellor, who asked what authority he had to alter an original writ? especially as *this writ was not originally intended to aid the process of this Court, but was a mandatory writ to prevent the King's subjects from going into foreign countries to practise treason with the King's enemies?* And said that perhaps there was no foundation for the doubt whether the common writ would not prevent the defendant's going into Scotland as well as any of the King's other dominions out of the process of this Court. His Lordship said, it was dangerous to alter old established forms, and therefore would make no order in it; but *left the parties to proceed in the old beaten path.* Cases in Chan. in Lord Talbot's Time 196. Pasch. 1736. Hunter v. Maccray.

Mr. Hamilton informed the Court that something of this kind had been in one Mitchell's Case in the Lord Cowper's time, [539] who seemed to think that the writ extended to Scotland notwithstanding the Union. The Registers likewise said, they never knew any other than the common order made, Ibid.

14. It is now mostly used *where a suit is commenced in this Court against a man, and he designing to defeat the other of his just demand, or to avoid the justice and equity of this Court, is about to go beyond sea, or however, that the duty will be endangered if he goes.* P. R. C. 251.

(C) Directed, executed, and discharged. How.

1. **EVERY** one upon a *surmise* made unto the Chancellor may sue forth this writ for the King, and then the party against whom it is sued may come into the Chancery, and obtain licence by letters patents, or by letters under the privy seal, or privy signet; and the licences are good, although they be not under the great seal, because those letters will excuse his contempt; and such licences are called *pass-ports*; and now by the statute of 5 R. 2. cap. 2. it is ordained, that no person pass out of the realm without the King's leave, but those who are excepted in that statute, and therefore see the statute. F. N. B. 85. (F)

P. R. C. 251
252. S. P.—
Cur. Canc.
455. S. P.—
The persons excepted by this act were lords and other great men, notable merchants and the King's soldiers, but

that statute is repealed by 4 Jac. 1 cap. 4.

2. A surety in a ne exeat regnum was denied to be discharged, tho' the answer was put in by the defendant; and so again after 19,000*l.* was decreed against defendant, and he committed for non-payment; per Ld. Wright. Ch. Prec. 230. Trin. 1704. Le Clea v. Trott.

3. If the writ is prayed, and the party by answer or other wife *satisfies the Court that he is not going beyond sea*, it will not be granted. P. R. C. 251.

4. It is an abuse of this process to *break open doors* and take the party in bed; but yet the Court would not order him for this cause to be set at liberty. P. R. C. 251.

Sometimes the writ mentions the sum certain, other times it

5. The party that sues it commonly marks on the back of the writ in what sum the *bond* for yielding obedience to the writ shall be, it is *generally* 1,000*l.* or some great sum. P. R. C. 251.

leaves the sum in which the party shall be bound to the sheriff, and in default of such sureties he carries him to the common goal of the country, there to be safely kept till he voluntarily gives such security, and this is to be certified by the sheriff into Chancery, and there is no way to discharge this but by a pass port under the great, or privy seal, or privy signet; Arg. and Holt Ch. J. said, it was true that if the sheriff take the security, he shall return it into Chancery; but that if the security be taken in B. R. it may be kept there. 12 Mod. 562, 563. Mich. 13 W. 3. in Naylor's Case.

6. If the writ be granted on behalf of a subject, and the party taken, what is generally done is this, the party either gives *security by bond* in such sum as is demanded, or he *satisfies the Court by answering*, (where the answer is not already in) or by *affidavit*, that he designs not to go out of the realm, and gives such reasonable security as the Court directs, and then he is discharged. P. R. C. 252.

[540] 7. While this was accounted a writ of grace, if the party, to whom the writ was, had *answered and denied the equity of the plaintiff's bill*, and the Court saw no cause to the contrary, the writ would be superseded. P. R. C. 252.

Negative.

(A) Negative Things.

There are propositions negative, which imply an affirmation, and those we call *negative pregnant*, which we do refuse in all issues of trials by jury, except in some cases, where the necessity of the cause requires the same, and there are also propositions merely negative, which are mere negations, of which we commonly say, *negativum nihil implicat*, a negative implies nothing; as the tenant wages law of non-summons, this does not imply

1. *N*egativa nihil certi implicat; but contra of negativa which includes in it an affirmative. Br. *Negativa* &c. pl. 39. cites 9 H. 7. 3. per Fineux.

negativum nihil implicat, a negative implies nothing; as the tenant wages law of non-summons, this does not imply

Imply that he was tenant, neither shall conclude him. Hawks's Max. 132. cites 22 H. 6. 41.—
So if one pleads *ne chasa pas* he did not hunt in the free chace of the plaintiff, this is no granting that the plaintiff had a free chace; but he must prove it. Ibid. cites 10 E. 3. 20.

2. *Affirmativum negativum implicat*; an affirmative includes a negative; for every statute limiting any thing to be in one form, altho' it be spoke in the affirmative, yet it includes in it self a negative, as the statute of W. 2. cap. 4. of a *quod ei deforceat* is, that the demandant shall vouch *ac si tenens esset in priori breve*, includes a negative, viz. and not otherwise, for it has been taken since, that if the first writ was a *scire facias*, and the tenant in the *quod ei deforceat* maintains the title of it, the demandant shall not vouch; for he shall vouch *ac si tenens esset in priori breve*, which is as much as to say, that he shall vouch, *ac si tenens esset in priori breve and in no other manner*, and then in the first writ (it being a *scire facias*) he could not vouch, no more can he now Plow. C. 206. b. 207. a. Arg. Ubi Plura. in Case of Stradling v. Morgan.

3. The defendant swore an affirmative, and afterwards an information was exhibited against him for it; though a negative could not be proved, yet the Court directed that they should first give their probable evidence, and that the defendant should afterwards prove his affirmative if he could. Cumb. '57. Trin. 3 Jac. 2. B. R. the King v. Comes.

4. Two negatives may be construed as a negative in grants, but not in pleas; for they are to be in Latin, and must be construed as Latin ought to be. Per Cur. 1 Salk. 328. Trin. 2 Annæ. B. R. Dillon v. Harper.

5. Negative may be imply'd by an affirmative, but not necessarily *e contra*. As the saying, that a papist, unless he conforms, shall not take by devise, does not necessarily imply that if he does conform, he shall take by devise &c. 2 Wm's Rep. 9 Pasch. 1722. in Case of Hill v. Filkin.

6. Where a trust of a term for raising portions for daughters directs a particular method for raising them, it implies a negative, that they shall not be raised any other way. 2 Wms's Rep. 19. Pasch. 1722. in Case of Ivy v. Gilbert & al.

7. An affirmative oath was made to ground an attachment upon; if the person against whom the motion is, denies the charge by oath positively and fully, the negative oath shall be preferred, and this is the only case in which it shall be so, 8 Mod. 81, Trin. 8 Geo. the King v. Ackworth & al.

[541]

(B) Pleadings.

1. THE defendant pleaded that it was the freehold of J. S. &c. and the plaintiff replied, that his freehold; he must say also, and not the franktenement of J. S. or, absque hoc that it is the franktenement of J. S. &c. Heath's Max. 98. cap. 5. cites 11 H. 4. 90.

X x 4

2. Where

Br. Disceit,
pl. 15. cites
S. C.—
Heath's
Max. 98.
chap. 5 cites
S. C.

2. Where the plaintiff declares in the negative, that the defendant sued the plaintiff in debt in the name of *M. absque voluntate & noticia M.* it suffices for the defendant to answer in the affirmative, that he sued by his assent, being retained of counsel, Prist. And well without traverse; and see lib. intrationum, that *this makes issue immediately, and conclude quod ponit se super patriam without more-a-do.* Br. Issues joins, pl. 14. cites 7 H. 6. 43.

And there it
appears, that
one of the
defendants
in trespass
pleaded, that

3. The defendant pleaded to the writ, that he was abiding at Dale; and no plea, without saying also, and not at B. as the plaintiff did name him; because the issue shall always be upon a negative, Heath's Max. 98. chap. 5. cites 19 H. 6. 1.
one of his companions was dead the day of the writ purchased; it is no plea for the plaintiff to reply, that he was alive at Dale, but must also say, and not dead; quod nota. As to say by way of replication in the like case, mulier and not bastard, or frank and not villein, et hoc petit quod inquiretur per patriam; quod nota. Ibid.

But it ap-
pears often
elsewhere,
that where a
plea is plead-
ed in the af-
firmative, as
seoffment,
release, &c.
or other af-
firmative
with a sans
ceo, there
this does not
make issue

4. Note per Littleton, it was adjudged by Sir John Junc in C. B. that he who pleads in avoidance of a fine, shall say, that * those who were parties &c. nothing bad in the tenements &c. at the time of the levying the fine, nor any of them any thing bad; but that one T. D. then was seised &c. whose estate &c. et de hoc ponit se super patriam; and the other shall say & ipse similiter, and there is no other rejoinder to be made; and the reason seems to be in as much as the defendant pleaded in the negative, and then this makes issue immediately, as ne dona par, nul tort, non culp. nihil debet &c. Br. Issues joins, pl. 3. cites 33 H. 6. 21.

immediately without a special replication or rejoinder. Note the difference. Ibid.— Heath's Max. 99. chap. 5. cites S. C.— But 12 Eliz. Dyer 290. In such plea the party that pleaded it had his election to conclude the issue or not. Heath's Max. 99. chap. 5.

5. And it was said there, that so it is of a counter-plea, that he who is vouch'd, nor any of his ancestors any thing bad, et de hoc ponit se super patriam. Ibid.

Heath's
Max. 99.
chap. 5. cites
S. C.
Heath's
Max. 101.
chap. 5.
cites S. C.

6. And in dower, to say, that the baron ne unque seise que dower, there he may [conclude] et de hoc ponit se super patriam, without other rejoinder, unless Prist, that he was as above. Ibid.

7. In debt, if the defendant pleads arbitrement to pay 10l. such a day and place, which he was ready there to pay at the time &c. and the plaintiff did not come there to receive it, there it suffices for the plaintiff to say that he was there ready without traverse; for the defendant tendered a negative before. Quod Nota. Br. Issue joins, pl. 86. cites 36 H. 6. 15.

Heath's
Max. 99.
chap. 5. cites
S. C. but
says it is
somewhat
doubted. 32.
H. 6. 25.—

8. In diverse cases issue shall be suffered in the affirmative without a negative. As in replevin, if the defendant avows as within his fee, and the plaintiff says, that hors de son fee, prist; this is a good issue; and yet both are in the affirmative, but the one is contrary to the other. Br. Issues joins. pl. 36. cites 6 E. 4. 6. per Littleton.

It was said for law by divers counsel, that in *replevin*, if the plaintiff after the avowry made by the defendant pleads *hors de son fee & seignory*, and the defendant says that *within his fee, priſt*; he shall say further, and not *dehors*, or *shall take traverse*; *quære inde*; for the entries are contrary, and this is one of the cases in which issue is good in affirmative without any manner of negative. Br. Issues joins, pl. 84. cites 32 H. 6. 23.

And Heath's Max. 98. says, that issue shall always be joined upon a negative after an affirmative alledged before; or, *e contra*; cites 11 H. 4. 19. [But *quære* if it be [542] not mis-cited.]

9. And in debt against executors, if the defendant says that *plene administravit*, and the plaintiff says that *assets &c.* this is a good issue. Ibid.

Heath's Max. 100. chap. 5. cites S. C.

10. And in writ of right, if the tenant says that he has more *mere right* to hold as he holds, than the demandant has to demand in manner as he demands &c. and the demandant says that he has more right in his demand than the tenant has to hold as he holds, this is a good issue, and yet all in the affirmative. *Quod non Negatur.* Ibid.

Heath's Max. 100. chap. 5. cites S. C.

11. Where the tenant pleads in the negative, the demandant may maintain his writ and answer in the affirmative, and this shall be a perfect issue; for in divers cases, as appears among the divisions of lib. intrationum placitorum, * affirmative may make perfect issue where a negative goes before. Br. Issues joins, pl. 21. cites 9 E. 4. 36.

Br. Maintenance de Brief, pl. 14. cites S. C. per Pigot.—As where he pleads *non-tenure*, it suffices for

the other to say, that tenant the day of the writ purchased; Priſt. Ibid.—Heath's Max. 98 chap. 5. cites S. C.—* S. P. Br. Issues joins, pl. 24. cites 36 A. 6. 15.

12. Debt upon an obligation upon condition that if the defendant did not prove that J. S. was not presented and instituted to the church of K. that then &c. and said that J. S. was not instituted; and good, per Brian, and Littleton J. For a negative cannot be proved, therefore it suffices to say in the negative as above, without saying that he has proved that he was not instituted &c. Br. Conditions, pl. 64. cites 15 E. 4. 25.

13. So of condition to prove that the defendant *nihil debet* to the plaintiff, it is sufficient to say, *quod nihil debet &c.* Ibid.

14. So of a bond to prove that my feme is not guilty of such a trespass, it suffices to say, that she is not guilty &c. But Jenny Serjeant contra, & adjournatur. Ibid.

15. Sometimes issue shall be permitted with two affirmatives without any negative, as where the one point is to be tried ouster le mere. Br. Issues joins, pl. 28. cites 6 H. 7. 5. Per Hussey and Fairfax J.

16. *Riens arrear* is a negative which includes in it an affirmative. Br. Confession, pl. 31. cites 9 H. 7. 3.

17. Where the defendant pleaded in the negative, (as in an action upon the case) he traversed the sale, and did not conclude *et de hoc ponit se super patriam*, but with *unde petit judicium si prædictus quer' actionem suam prædictam versus eum habere debeat &c.* and yet good; because a perfect issue may be joined thereupon; *Quod Nota.* Heath's Max. 99. cap. 5. cites 2 & 3 Mar. Dyer 121, pl. 14.

S. C. And 20. Ld. Mounteagle v. the Countess of Worcester. The plea was *quod ipsa non vendidit catenam &c.*

18. Custom

18. *Custom* lies not in the negative, but it may be in the negative with affirmative precedent, as to prescribe to buy and sell without paying toll; but it is no good custom to say, that he has not paid toll. And the same of not paying tithes. Br. Customs, pl. 23. cites 7 H. 6. 31, 32. and 8 H. 6. 3.

19. In all *pleadings* it is unformal and incongruous to *aver* a negative. Mich. 1656. Arg. Hard. 81. in Case of Attorney General v. Buckridge.

[For more of *Negative* in general, see *Attainr*, *Nil habuit in Sententia*, *Trial*, and other Proper Titles.]

(A) *What it is.*

Heath's
Max. 101.
S. P.

1. **N**egative pregnans, that is, a negative plea implying also an affirmative. As if a man being impleaded to have done a thing upon such a day, or in such a place, *denies* that he did it *modo & forma declar'*; which implies nevertheless, *that in some sort he did it.* Reg. Plac. 94.

2. Negative pregnant is, when *two matters* are put in issue in one plea, and this makes the plea to be naught; because the plaintiff cannot tell in which of these matters to join issue, for the *incertainty* upon which of the matters the defendant does insist. Reg. Plac. 189. cites Pract. Reg. 220.

(B) *What Plea shall be said to be Negative Pregnant.*

But in trespass per Brian. 31 E. 3. in ingressu fine assensu capituli the tenant said that the abbot did not alien fine assensu conventus, and it was held no plea; for it is negative pregnant; for he shall say that he did not alien modo & forma &c. Br. Negative, pl. 25. cites 15 E. 4. 18.

1. **I**n formedon the tenant pleaded alienation of the father of the demandant before the statute of Westm. 2. and was compelled to say to whom, who said to J. S. and the other would have said only, that he did not alien before the statute prout &c. and was compelled to say, that he did not alien before the statute to J. S. and so the issue accepted; Brooke says quod mirum! for this is a pregnancy at this day fully; quod cave. Br. Negative, pl. 28. cites 24 E. 3. 33.

for he shall say that he did not alien modo & forma &c. Br. Negative, pl. 25. cites 15 E. 4. 18.

So where the defendant justify'd entry because *A.* tenant by the curtesy, the reversion to him, alien'd in fee, the plaintiff said, that *A.* did not alien in fee; it is no issue; by which he said, that he did not alien, Prist; and then a good issue; for alienation in tail, or for term de autre vie is a forfeiture. Br. Issues join, pl. 44, cites 4 E. 3. 5.—S. P. For denying that he hath alien'd in he seems to confess that he hath aliened in some other sort. Reg. Plac. 94.—S. P. Heath's Max. 101, 102. cap. 5.

In a writ of entry, ne entra pas contra formam statuti, or he did not alien within age, are negative pregnant; but the party may say, he did not alien modo & forma, per Gawdy J. 2 Leon 198. Mich. 29 Eliz. B. R. in Case of Dighton and Clark.

2. The plaintiff intituled himself to the land and charters by conveyance, that is to say from *A.* to *T.* and from *T.* to *J.* and from *J.* to the plaintiff; the defendant said that *A.* never had such son as *T.* father of *J.* And therefore ill and pregnant, and as much as to say, that *A.* had no such son as *T.* or that *T.* was not the father of *J.* Nota Br. Negativa, pl. 13. cites 14 H. 4. 2. 9.

S. P. Br. Charters de terre, pl. 21. cites 14 H. 4. 23, 24, 27. & 12 H. 6. 1.—Br. Pleadings, pl. 20. cites S. C.

3. Note, that if a man pleads that he did not disturb *J. F.* to occupy such land by command of *W.* S. this is a negative pregnant; by which he took the disturbance by protestation, & pro placito quod *W.* S. non præcepit modo & forma &c. Br. Negativa, pl. 1. cites 9 H. 6. 44.

4. A man pleaded deed of the demandant in writ of entry after the last continuance, and the demandant said, that not his deed after the last continuance; and this is negative pregnant; quod nota; by which he said that he made it by dures before the last continuance such a day, absque hoc that he made it after the last continuance, and then issue was taken accordingly quod nota by Newton Ch. J. and Paston J. but Ascue J. dubitavit. Br. Negativa, pl. 18. cites 21 H. 6. 9.

Br. Continuance, pl. 26. cites S. C.

5. Trespass in *E.* the defendant said, that the place where &c. contains 3 acres, and is called *D.* which is & tempore &c. was the franktenement of *W. P.* by which he as a servant and by his command did the trespass &c. the plaintiff said, that the place where &c. is called *M.* and that *D.* and *M.* are one and the same place, and known by the one name and the other, and the defendant said that they are diverse places and not all one and the same place, nor known and named by both the names prout &c. and so ad patriam. Quære if it be not double or pregnant. Br. Trespass 142. cites 21 H. 6. 20, 21.

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6. In writ of entry the tenant intituled himself by dying seised of *R.* and the plaintiff intituled himself by dying seised of one *J.* after the death of *R.* to which the tenant said, that the said *R.* was seised in fee, and died seised as above, and the land descended to *K.* &c. who entered and leased to *J.* for life, of which estate he died seised, and *K.* died, and the land descended to *C.* who enfeoffed us, absque hoc, that *J.* died seised in fee after the death of *R.* and this was held pregnancy, that is to say, the dying seised in fee, and after the death of *R.* by which he said as above, absque hoc that *J.* died seised in fee, and then well. Br. Negativa, pl. 23. cites 22 H. 6. 23.

7. Trespass by *W. C.* and *Jane* his feme, the defendant took day over, and at the day said that there was no such *Jane* feme
of

of C. in *rerum natura* the day of the writ, nor ever after, judgment of the writ; and the plaintiff said that this is pregnancy; * but per tot. Cur. it is a good plea; for *Jane feme of C. is not but her name*, and is only her name; quod nota ideo bene. Br. Negativa, pl. 2. cites 27 H. 6. 8.

S. P. Br.
Negativa,
pl. 34. cites
33 H. 6.
22.

8. Debt because the plaintiff was retained for 8 years with the defendant in husbandry for 20s. a year, and for so much arrear of his salary &c. and the defendant because he could not wage his law, therefore he travers'd the contract, and said that he did not retain him in husbandry, and a good plea and not pregnant, and shall not be compelled to say quod non retinuit only; for then if he was retained in any manner, the issue shall be found against the defendant, and it is a good replication, quod retinuit ipsum modo & forma prout &c. without saying, quod retinuit in husbandry; for it shall have relation to the declaration; quod nota. Br. Issues joins, pl. 25. cites 38 H. 6. 22,

And therefore where the plaintiff in bar of the avowry had

9. In recordare the defendant pleaded against the plaintiff, not the deed of S. after the time of memory, and it was held negative pregnant. Br. Negativa, pl. 35. cites 39 H. 6. 7, 8. pleaded gift of the land by S. by the deed, and after time of memory; (for as the deed it seems was without date) and the defendant said that S. did not give the land after time of memory prout &c. and the others e contra, and the issue was entered accordingly. Quære if pregnant. Ibid.

10. Trespass upon 5 R. 2. the defendant said, that before the entry J. N. was seised and enfeoff'd the defendant, and gave colour; the plaintiff said, that before J. N. any thing had, he himself was seised till by D. disseised, who enfeoff'd the said defendant, and he entered and was seised quousque &c. Litt. said, before the plaintiff any thing had, the said D. was seised &c. and enfeoff'd he said N. who enfeoff'd the defendant, by which he was seised till by the said D. disseised, absque hoc, that the said D. disseised the plaintiff before the feoffment made by the said D. to the said N. Prius; and the others e contra; and the issue was held good by all the Court. Br. Negativa, pl. 52. cites 1 E. 4. 6.

11. Quære impedit upon a voidance by deprivation; the other said, that it did not void by deprivation, and it was admitted; quære if it be pregnant; for it was not argued. Br. Negativa, pl. 47. cites 5 E. 4. 3.

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Br. Traverser,
per
sans &c. pl.
109. cites

15 E. 4. 22. S. C.——* It should be 15 E. 4. 23. a. pl. 1.

* Orig.
(vers)——
Heath's
Max. 102.
cap. 5. cites
S. C.

12. In trespass the party travers'd absque hoc, that J. D. abated after the death of J. H. and before the death of W. and well, per Cur. quod nota. And therefore it seems that it is not pregnancy. Br. Negativa, pl. 25. (bis) cites * 5 E. 4. 22.

13. In trespass after issue joined, * came the defendant at another day and pleaded release after the last continuance; and the opinion was, that it is a good issue, that not his deed after the last continuance. Br. Issues joins, pl. 71. cites 16 E. 4. 5. 14. In

14. In debt upon an obligation under the covent seal against successor of the abbot he said, that not the deed of the abbot and covent; and per justiciarios it is not pregnant; the reason seems to be inasmuch as all is one corporation, quod nota bene, and see the book and nota bene. Br. Negativa, pl. 50. cites 21 E. 4. 66.

15. It was presented that the prior of D. by reason of his tenure in D. ought to scowr a ditch in D. and that he and his predecessors have used to scowr it &c. the prior said, that he and his predecessors ought not to scowr by reason of his tenure in D. nor the prior and his predecessors have not used to scowr it &c. and the opinion was, that if he had not answered to both points the issue had not been good, but it was not argued. Br. Issues joins, pl. 43. cites 21 E. 4. 73.

16. Debt upon an obligation with condition to find 7. S. sufficient apparel till the age of 21 years, the defendant said, that he found sufficient apparel during the time &c. And the plaintiff said that he did not find him sufficient apparel during the time, and the issue taken upon all the time and upon no time certain, and good per Cur. Quod nota that it is not pregnant. Br. Negativa, pl. 40. cites 12 H. 7. 14. Br. Negativa, pl. 45. cites S. C.

17. Debt upon a lease for years made by the plaintiff, the defendant said, that E. was seised in fee, and leased to the plaintiff at will who leased to the defendant, and the said E. re-entered and made livery over, before which entry nothing was arrear, and the plaintiff made title absque hoc that E. leased at will, and a good plea per Cur. Therefore see that it is not negative pregnant. Br. Negativa, pl. 32. cites 21 H. 7. 26.

18. In information against J. K. for buying cloths of A. B. contra formam statuti de anno 24 H. 8. he said, that he did not buy of A. B. contra formam statuti prout &c. and no issue; for it is not material if he bought of A. B. or of W. N. or of any other, but if he bought the cloths contra formam statuti or not, and therefore the issue shall be that he did not buy modo & forma &c. Br. Issues joins, pl. 81. cites 33 H. 8. Br. Negativa, pl. 54. cites H. 33. H. 8.—Heath's Max. 102. cap. 5. cites S. C.

19. Debt was brought upon an obligation, the condition whereof was, that J. S. shall not disturb the plaintiff in his possession by any indirect means. To which the defendant pleaded, that he did not disturb the plaintiff in his possession by any indirect means, but by due course of law; and it was objected that the plea was ill, because not shewed how by course, viz. what suit. But agreed the plea would have been good, if he had only said, not disturbed by any indirect means; but doubted if not ill, because he pleads over by lawful means and says not what, so that it may be tried. Heath's Max. 53. cites 2 Le. 199. Dighton v. Clark. This is 2 Le. 197, 198, pl. 248. Mich. 29 Eliz. B.—But if I am bound not to go out of Westminster Hall, until night, but tarry in the Hall till night, in an action against me

upon that bond I may plead in Iisdem verbis. 2 Le. 198. Mich. 29 Eliz. B. R. per Gawdy J. in case of Dighton v. Clark.

So if I be bound upon condition that I will not return to Serjeants-Inn the direct way, but by St. Giles's, I shall plead in totidem verbis; to which Godfrey agreed, for the matter which comes after the (But) is triable by the country, but so it is not in the principal case. Per Clench (But) is but a word of surplusage, and if that and all which follows had been left out, it had been well enough. It was adjourned. Ibid.

In debt upon bond, the condition whereof was not to attorn tenant to any other person without the consent of

plaintiff, his executors, administrators or assigns, the defendant pleaded, that he did not attorn tenant without the consent of the plaintiff. Exception was taken that this plea was a mere negative pregnant, but was over-ruled and judgment given for the defendant. Lutw. 590. Patch. 9 W. 3. Keating v. Irish.

In debt on bond to perform covenants in indenture of lease made by the plaintiff to the defendant, in which defendant covenanted not to deliver possession to any but the lessor or such persons as should lawfully evict him, the defendant pleaded, that he did not deliver the possession to any but such as lawfully evicted him. The plaintiff demurred, and it was objected that the plea was ill and a negative pregnant and that he ought to have said, that such an one lawfully evicted him to whom he delivered possession, or that he did not deliver the possession to any. But the defendant said that the plaintiff had not assigned any breach and therefore could not have any judgment. To which it was said for the plaintiff, that he having pleaded an ill plea has forced the plaintiff to put himself upon the judgment of the Court upon the plea, and cited Yelv. 58. 152, 153. And Windham J. held the plea ill; but Twisdan J. contra. The case was argued again in another term, and then all the Court held the plea pursuing the words of the covenant good being in the negative, and that the plaintiff should have replied and assigned a breach, and for default thereof judgment was given against him. Lev. 83. Mich. 14. Car. 2. B. R. Pullins v. Nichols.—Keb. 380. 413. S. C.

21. Lessee covenanted for himself and his assigns to build a house upon land demised before such a day and to keep it in repair; and after the day covenant was brought against assignee for not repairing. Defendant pleads the house was not built before the day, and upon general demurrer adjudged that the plea was a negative pregnant. 12 Mod. 384. Anon.

22. In an action of trespass the defendant justifies by licence from the plaintiff's son. The plaintiff replies, quod non intra-vit per licentiam suam. That is a negative pregnant; for he ought to traverse the licence by it self, or the entry by it self. Reg. Plac. 189 cites Pract. Reg. 220.

(C) Helped by Verdict. In what Cases.

S. P. Br.
Negativa,

Pl. 42. ci es
3 H. 8 46.

As in trespass

1. **W**HERE a negative pregnant is found for the plaintiff it is good, contra where it is found for the defendant. Br. Issues joins, pl. 39. cites 12 E. 4. 6.

ubi ingressus non datur per legem by K. against J. and E. and J. died pending the writ, and E. said that H. gave the land to R. in tail and died proeslando seised, and the land descended to one J. as son and heir of R. and he entered and died seised, and the land descended to E. the defendant as brother and heir of J. by which he entered and gave colour to the plaintiff, the plaintiff said that A. was seised and gave the land to W. in tail, who died seised and the land descended to the plaintiff as daughter and heir of the said W. by which she entered and was thereof seised till the said E. with J. named in the writ, in the life of J. entered upon her, ubi ingressus non datur per legem, and that J. named in the writ, and J. who is supposed by the defendant to die seised, are one and the same person and not divers, and the defendant said, that he did not enter together with the said J. in the life of the said J. point &c. and so to issue, and found for the plaintiff and he pray'd judgment. Pigot said, the issue is joint, and upon a negative pregnant, and therefore judgment he ought not to have. Per Curiam if the issue was not well joined, yet when it is found for the plaintiff the verdict has made the plea good, and so the issue above was held good by reason of the verdict, and so where the issue is upon a double plea if both are found for the plaintiff. Br. Issues joins, pl. 39. cites 12 E. 4. 6. & 10 H. 6. accordingly.—Br. Repleader, pl. 37 cites S. C.

[For more of Negative Pregnant in general, see Abatement, and other proper Titles.]

Negligence.

(A) *Advantages lost by Negligence.*

1. **UPON** a rule given in C. B. for a prohibition, the party laid by his prohibition and the ecclesiastical Court proceeded to sentence. Afterwards the party appealed and the other deliver'd the prohibition 2 terms after, but having surceased his time and suffered sentence to pass he was denied to have benefit of his prohibition. And a difference taken where a prohibition was granted and the party not serving it sentence of excommunication is pronounced in default of answer, there upon the matter he may have the benefit of his prohibition but not where there is a sentence definitive. Cro. J. 429. pl. 6. Trin. 15 Jac. B. R. Anon.

(B) *Bar of Right, in what Cases, or only a Postponin.*

1. **A.** Grants 1000 coard of wood to B. to be taken at the election of B. If A. or a stranger cuts any trees, B. cannot take them but must supply his grant out of the residue. 5 Rep. 25. Pasch. 43 Eliz. B. R. Sir Tho. Palmer's Case.

2. A. covenants to stand seised to the use of himself for life, and after to the use of his daughters that shall be unmarried at the time of his death until every one of them successive shall or may have levied 500l. remainder to his eldest son.—A. had 4 daughters. The land was worth 100l. per Ann. The father died 30 Eliz. The son enters. The eldest daughter enter'd 42 Eliz. She surpass'd her time and could not enter; per Bridgman. Cart. 78. cites Cro. El. 800. Mich. 42 & 43 Eliz. C. B. Blackborn v. Lasse's.

It was held that she should not enter to prejudice the other sisters so as to prevent their raising their portions, but she had remedy

against the eldest son who had received the profit, in disturbance of hers. Cro. E. 800. S. C.—S. P. For it was her folly to suffer the son to continue possession. Noy. 33. S. C. by name of Brandford v. Lasse's.—Devise to A. until he shall or may raise such a sum out of the profits of the land. If a stranger enters after the decease of the deviser, tho' the devisee had no notice of the will, yet the time shall run on as much as if he had the land in his own possession. Vent. 202. in Lady Anne Fry's case, cites 4 Rep. Sir And. Corbet's Case.—Mo. 556. Rolfe's Case.

3. Devise of lands to trustees in fee to pay debts and legacies, and after these paid to sell, and if any of the testators name would purchase, they to have it for 200l. less than the value. One of the name brings a bill for pre-emption, but delays bringing it till 25 years after testator's death. Bill dismissed. Hill. 1685. Vern. R. 362. Huckstep v. Mathewes.

4. If

And if such executor has any claim to any real estate of his testator's if he does not prosecute a bill by him brought to make good his claim,

but on the contrary suffers the proceedings in the account, and the rents of the lands claimed by him to be accounted for as part of his testator's estate, he is so far barred; but it cannot operate as a bar to the realty or as any extinguishment of the right to the land. Ibid. 677.

4. If there be a decree for an account to which an executor is party, and he has a debt due to him which he does not claim but lies by, and the account is taken and perfected, he shall not bring a new bill for his debt and put the estate to the expence of a new suit to obtain a satisfaction which he might have had in the course of the former proceedings. Per the Master of the Rolls who said, that this is not acting agreeable to his trust. 2 Wms's Rep. 665. Mich. 1734. Cowper v. Earl Cowper.

1. Further assurance was not demanded within the time, yet equity ordered to make further assurance afterwards. Toth. 76. cites 1594. Kemp v. Palmer.

2. If a purchaser neglects to enrol his deed of bargain and sale being his only assurance, and the bargainor brings an ejectment against him and hath judgment. The bargainee may resort to Chancery and there be relieved, if not for the land yet for the money paid. Mich. 13 Jac. 1. Chan. R. 10. in the Earl of Oxford's Case, cites Jacques v. Huntley. 13 June 1599. in Chancery.

2 Wms's Rep. 13. S. C. And the Reporter says it was afterwards, Feb. 1723, confirmed in the House of Lords, tho' thought a very hard case. Ibid. 21.

3. A term was vested in trustees, upon failure of issue male, to raise 1500l. for daughters. And it was, that the trustees by, and out of the rents, issues, and profits of &c. as well by leasing or demising the same for 21 years, or three lives, or for any term &c. of years determinable on three lives not exceeding 120 years, should raise and pay for portions &c. 1500l. but no time limited for payment, nor any proviso for determining the term on payment. The trustees died. Then the father died, leaving a daughter, but no issue male, but had conveyed the remainder to B. for life, remainder to his first &c. sons in tail, and in default, remainder to C. for life, and after to his first &c. sons &c. remainder over. The daughter took letters of administration to the surviving trustee, and she and B. mortgaged the land, which was 160l. per annum, to J. S. and B. covenanted to pay the money. B. entered and took the profits, and paid the interest, but none of the 1500l. principal, and died without issue. Ld. Macclesfield observed, that this was a power to lease only for 21 years, or three lives determinable on any number of years not exceeding 120, and decreed, that (the 1500l. being to be raised out of the annual profits as they arose) the receipt of B. was the receipt of the daughter her self as to those in remainder, and J. S. standing in her place, who had the legal estate as administrator to the surviving trustee, and was also

also cestuy que trust, the profits received by B. shall go in satisfaction of so much of the 1500l. and the residue to be charged on the remainder. But decreed further, that *what might have been raised by letting leases according to the power by way of fine*, if B. had apprehended his estate chargeable with the money, and so had taken the benefit of making such leases, that they *must be accounted for by the remainder-man* the defendant. Ch. Prec. 583. Pasch. 1722. Ivy v. Gilbert.

[For more of Negligence in general, see Condition, Grants (H. a. 2) Mortgage, Presentation, and other proper Titles.]

Negro.

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(A) Of what Consideration they are in the Eye of the Law, and what Actions lie for taking them.

1. **I**N *trover* for 100 negroes, and upon not guilty pleaded a special verdict found that the negroes were *infidels subject to an infidel prince, and used to be bought and sold in America, as merchandize* by the custom amongst the merchants, and that the plaintiff had bought them, and was in possession of them, and that defendant took them out of his possession. It was argued, that no property can be in the person of a man whereupon to maintain trover, and cited Co. Litt. 116. that no property can be in villeins, unless by compact or conquest. But the Court held, that they being usually bought and sold among merchants as merchandize, and being infidels, a property may be in them sufficient to maintain the action; and gave judgment for the plaintiff nisi causa this term. But at the end of the term, upon the prayer of the Attorney General to be further heard, day was given to the next term. 2 Lev. 201. Trin. 29 Car. 2. B. R. Butts v. Penny.

2. In *trespass* the Count was, that the defendant *vi & armis unum Æthiopem* (Anglice vocat. a negro) *ipsius querentis pretii 100l. apud London &c. took and carried away, and kept the plaintiff out of possession* of the said negro from that time usque diem exhibitionis billæ prædictæ. per quod he lost the use of his said negro. Upon not guilty the jury found, that the negro

The jury found, that the negro taken was born of negro parents belonging to the plaintiff's planta-

tion in Barbadoes as slaves, and that an ordinance was made by the deputy governor, council &c. of the said island, that the negro slaves there shall be real estates, and descend to the heir &c. as

had been *baptized after the taking*, upon which a question was made, *whether the baptism was a manumission?* As to that the Court gave no opinion; but held, that trespass lies not; because a *negro cannot be demanded as a chattel*, nor can his price be recovered in damages in action of trespass, as in case of a chattel; for he is *no other than a slavish servant*, and the master can maintain no other action of trespass for taking his servant, but such only as concludes *per quod servitium amittit*, in which the master shall recover for the loss of his service, and not for the value, or for any damages done to the servant. Judgment *quod querens nil capiat per Billam*. Carth. 396. Hill. 8 W. 3. B. R. Chamberlain v. Harvey.

lands of inheritance, by which means the plaintiff's mother became intitled to the said negro for her life, and that her after husbands brought this negro into England, where he continued in his service several years till the death of his wife, when the said husband put the negro out of his service, who afterwards served several other masters here, and at the time of the trespass supposed, was in the service of the defendant, and had for his wages 6L. a year. The case was argued & adjournatur; but in Hilary term after judgment was given that the bill abate; for the Court held, that *trespass for taking away a man generally will not lie*, but a special action of trespass might be for taking of his servant; *per quod servitium amittit*. 5 Mod. 182. to 191 S. C.

3. In *indebitatus assumpsit* the plaintiff declared for 20l. for a negro sold by the plaintiff to the defendant viz. *In parochia beate Mariæ de Arcubus in Warda de Cheape*, and verdict for the plaintiff. And on motion in arrest of judgment Holt Ch. J. held, that as soon as a negro comes into England he becomes free; one may be a villein in England, but not a slave. Per Powel J. The law took no notice of a negro. And Holt said, it should have been averred in the declaration, that the sale was in Virginia, and by the laws of that country negroes are saleable; for [550] the laws of England do not extend to Virginia, which being a conquered country, their law is what the King pleases, and we cannot take notice of it but as set forth; and therefore directed, that the plaintiff amend the declaration, which should be made that the defendant was indebted to the plaintiff for a negro sold here at London, but that the said negro at the time of the sale was in Virginia, and that negroes by the laws and statutes there are saleable as chattels. And then the Attorney-General coming in said, that they were inheritances transferrable by deed and not without. And nothing was done. 2 Salk. 666. Smith v. Browne and Cooper.

4. *Trover* lies not for a negro; for men may be owners, and therefore not the subject of property; and the Court seemed to think, that in trespass *quare captivum suum cepit*, the plaintiff might give in evidence that the party was his negro, and he bought him. 2 Salk. 667. Mich. 4 Ann. B. R. Smith v. Gould.

[For more of Negro, see *Homine Replegiando*, Pl. 5. and other proper Titles.]

De Unques Accouple.

(A) Good Plea. In what Cases.

1. **WHERE** a feme has a baron, and takes another baron, and she and the second baron brings assise, or *cui in vita &c. de jure uxoris*, ne unques accouple is no plea; for the action is good by baron in possession. Br. Brief, pl. 91. cites 50 E. 3. 19. S. P. Br. Appeal, pl. 17. cites 50 E. 3. 15. by the best opinion. But
 in appeal, dower &c. where she demands by her baron, it is a good plea.

2. It is an ill plea in debt, because marriage de facto is sufficient to intitle the plaintiff to this action, and because it puts it on trial by certificate which admits a marriage, but not secundum leges ecclesiæ; he should have pleaded *no marriage in fact*, and that would have been tried per Pais. Show. 50. Trin. 1 W. & M. Allen v. Grey. S. P. Appd whether legal or not legal is no ways material. 2 Salk. 437. S. C. —S. P. 1 Lev. 41.

in case of Basset v. Morgan.—So in trespass for taking his wife, and was so adjudged, and a respondeas ouster awarded; because a marriage in fact is sufficient to maintain this action; but per Holt, a plea that they were not married, or not covert in marriage, would be good. Comb. 131. Trin. 1 W. & M. B. R. S. C.

3. In assault and battery brought by baron and feme, it was held upon demurrer to be no good plea; for it cannot be tried at common law, the jurisdiction whereof ought not to be taken away in personal actions. Comb. 473. Pasch. 10 W. 3. B. R. Jones & Ux v.

4. Case by baron and feme for a cause arising before marriage; defendant pleads, that the plaintiffs nunquam legitimo matrimonio copulat' fuerunt. Plaintiffs replied, that they were married at a such a time and place; the defendant demurred, and thereupon judgment was given for the plaintiff, because the plea was naught; for in personal actions you must lay the matter on the fact of the marriage to make it triable by the country, and not upon the right of the marriage as in appeals and real actions. 12 Mod. 276. Hill. 11 W. 3. Mitchell & Ux v. Garrett. [551]

[For more of De Unques Accouple in general, see Dower, Trial (P) per tot.—(B. 8) Pl. 1, 2, 3. and other proper Titles.]

(A) Nient Comprise, or not Parcel.

1. **N**ient comprise is an exception taken to a petition as unjust, because the thing desired is not contained or comprehended in that act or deed whereupon the petition is grounded. For example, one desires of the Court, to be put in possession of a house formerly among other lands &c. adjudged unto him. The adverse party pleads, that his petition is not to be granted, because tho' he had a judgment for certain lands and houses, yet the house, into the possession whereof he desires to be put, is not contained among those for the which he had judgment. Reg. Plac. 94, 95. cap. 2.

Br Customs,
pl. 66. cites
S. C.

2. In assise; if the plaintiff makes title, in as much as the land is of the fee which is partible between males &c. the other shall not plead that it is not partible without shewing that it is not parcel of this fee; for if he confesses that it is parcel of the fee of E. and that this fee is departible, he shall not say that this land is not departible where the entire fee is departible, but he may say that this not parcel of this fee, or may shew special matter how that those lands are other than the gross is. Br. Comprise, pl. 11. cites 23 Aff. 12.

Br. Comprise,
pl. 14
cites S. C.

3. In assise; the tenant pleaded a recovery by himself against the plaintiff in a writ of entry sur disseisin of the manor of H. of which these tenements are and were parcel, in which writ the plaintiff had the view of the manor, and of these tenements then parcel, judgment if assise; the plaintiff said that these tenements are not, nor ever were parcel of the manor in the possession of the tenant, Prist; Per Fish, you shall answer to the putting in view. Per Thorp, where I plead in bar against you by fine, there it is a good plea, that nient comprise; and where judgment is pleaded, viz. a recovery, there it is a good plea that nient comprise, or not parcel. But where I allege a recovery in which the view was made, there nient comprise is no plea, nor to say not parcel without answering to the view; and therefore Ludd seeing the opinion of the Court said, that the tenements are not, nor ever were parcel of the manor, nor ever put in view as parcel of the manor, Prist; and the others contra. Br. Barre pl. 66. cites 22 Aff. 20.

4. In assise; the tenant said that the plaintiff has writ of entry in the post of the same land pending against him, in which he has had the view, judgment of this writ of a more base nature; the plaintiff said, that the tenements now put in view are not parcel of the tenements put in view in the first writ, Prist by the assise, and the other said, -that they are parcel of the tenements demanded

by the first writ, Prist by the assise. Per Thorp, this is a good answer, and the assise awarded upon this point; but by him, it had been greater advantage for the tenant to have said, parcel of the tenements put in view; for then the assise had not been taken till process had been made against the first veiors. Br. Comprise, pl. 13. cites 29 Aff. 66.

5. In assise the tenant *pleaded recovery against the same plaintiff of the same tenements in another vill, and the same tenements put in view, and the plaintiff said, not put in view, and so nient comprise;* and it was tried by the first jurors, and yet it was returned before in such assise, that the first jurors were dead, and before the same justices. Quod Nota. Br. Comprise, pl. 4. cites * 45 E. 3.

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S. P. Br.
Comprise,
pl. 25. cites
44. Aff. 19.
—S. P. Br.
Record, pl.
14. cites 44
E. 3. 45. —
• Quære if

this is not miscited, and perhaps should be 44 E. 3. 45.

6. In assise of three acres of land Perle *pleaded recovery against the ancestor of the plaintiff by formedon of the manor of D. who had the view, and this land put in view as parcel;* judgment if assise. Cherle said, not parcel, Prist by the assise. Persay said, you shall say not put in view as parcel, or nient comprise; et adjournatur. Br. Comprise, pl. 16. cites 45 Aff. 11.

In assise of
three acres,
the tenant
pleaded reco-
very of 12
acres by for-
medon, of
which the
land in plaine

is parcel, against a stranger, and the title of the plaintiff mesne between the bringing of the formedon and the judgment in it. The plaintiff reply'd, that the land now in plaint is not parcel of the land recovered by the formedon. Per Hussey, if the recovery was of a manor, then not parcel is a good plea, but one acre cannot be parcel of another acre, and therefore shall say, that the land put in view was not comprised in the recovery of the formedon, and then a good plea, and so there is a difference; by which the plaintiff pleaded that nient comprise, Prist; and the others e contra. Br. Comprise, pl. 33. cites 1 E. 3. 8.

7. You cannot have a nient comprise against an express thing; per Coke Ch. J. 2 Bulf. 319. in the case of Wilson v. Welch, cites 48 E. 3. 11.

8. When a recovery is pleaded of 4 acres, of which the acre in dispute is parcel, the defendant shall not say not comprised, but shall say not parcel; per Cur. By which he said that it was not parcel, and so not comprised, and ill; for by the nient comprise the matter of not parcel before is waived, quod nota, per Cur. By which he said, that not parcel at the time of the recovery, and dubitatur if he shall say, not parcel at the time of the recovery of the formedon, or at the time of the scire facias of the execution sued thereupon. Quære. Br. Comprise &c. pl. 22. cites 2 E. 4. 18.

9. Entry in the quibus; per Danby where recovery is pleaded, it is a good avoidance to say that nient comprise, but in recovery per visum juratorum or of the party a man shall say not put in view and so nient comprise; but in the case of Kniveton 3 H. 6. 15. where recovery of a manor was pleaded, of which the land after in variance was parcel, the party was compell'd to take issue, parcel or not parcel. And T. 48. E. 3. 11. in * avowry for rent charge granted by fine out of the land, of which the place &c. is parcel, the issue was not parcel of the land charged.

* S. P. Br.
Comprise,
pl. 1. cites
3 H. 6. 15.

charged. T. 7. E. 3. Nuper obiit of tenements in dale, the tenant pleaded fine levied by the ancestor of the said tenements in S. and that D. is a hamlet of S. The plaintiff said that D. is a vill by itself, and the issue taken, and yet this amounts only to nient comprise. Br. Comprise, pl. 24. cites 9 E. 4. 17.

[For more of Nient Comprise, see Fines (L. b. 2.) Manor. Reversion (U) Trial (N. 2.) (F. a) and other proper Titles.]

Nient Dedire.

(A) *What amounts to it. And in what Cases Nient Dedire amounts to a Confession.*

Br. Estoppel,
pl. 12. cites
S. C.

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1. **I**N assise if the deed of the ancestor of the plaintiff whose heir &c. with warranty is pleaded in bar, and the plaintiff says that he himself is a bastard, by this the deed shall not be intended Nient dedire. But Brooke says, the better pleading is to take it by protestation. Br. Confession, pl. 24. cites 11 Aff. 24.

* All the Editions of Brooke are (defendant) but it should be (plaintiff) and so is the Year-book.

2. *Trespas of taking his horse brought by H. S. The defendant said, that he himself was thereof possessed ut de proprio, till one H. S. of D. took it and gave it to the plaintiff, and the defendant retook it; the plaintiff said, that H. S. in the bar and H. S. the * plaintiff are one and the same person, and not divers, and to the plea [of] the defendant demurred. Rogers said, by this replication the plaintiff has not deny'd but that he took the goods of the defendant, because he says that he is the same person. But per Littleton J. it is not so; for a thing shall not be held nient dedist where a man does not give answer to it; and here he need not give answer to it; for when he says, that the one and the other are the same persons, this destroys the bar when the defendant does not deny it but joins to the demurrer; and this makes the plea no plea, and to amount to not guilty, and so it is no bar; by which the plaintiff recovered; Quod Nota. Br. Confession, pl. 35. cites 13 E. 4. 7.*

3. *In rescous the plaintiff counted upon a tenure, and that he distrained, and the defendant made rescous, and the defendant pleaded not guilty, where the truth was, that there was no tenure, but the defendant was tenant at will rendering 10s. per ann. the plaintiff*

plaintiff distrained and he made rescous; and per Fineux, this plea of *not guilty* is no confession of the tenure or *nient dedire*; but if he had pleaded *riens arrear*, this had been a *nient dedire* of the tenure, contra of the not guilty; because *negativa nihil implicat*, but contra of *riens arrear*; for this is a negative which includes in it an affirmative. Br. Confession, pl. 31. cites 9 H. 7. 3.

4. In *trespass* it was agreed, that if the defendant justify the taking of the goods by licence of the plaintiff to retain it as pledge till 10l. debt be paid to him, and the plaintiff demurs generally, by this he confesses the debt of 10l. to the defendant; contra it seems if he had said *protestando* that he did not owe the 10l. and pro placito demurred. Br. Confession, pl. 61. cites 5 H. 7. 1.

(B) The Difference between Nient Dedire and Confession. And the Effect of the Nient Dedire.

1. WHERE the tenant in any action alleges nonage in one within age, or vouches one, and says that he is within age, or prays aid of one within age, and prays that the parol demur, and the demandant does not deny it, there the parol shall demur without having process to try it by inspection. Br. Confession, pl. 28. cites 29 Ass. 37. Br. Age, pl. 36. cites 9. C.

2. Per June, there is a great diversity between confession and nient dedire; for in *præcipe* against two, if the one appears and says nothing, or makes default, and the other takes the entire tenancy and vouches, or pleads in bar, there the demandant may answer to it without saying any thing to the other, and this nient dedire shall not abate the writ, contra of his confession, if he had confessed that the other had nothing. Br. Confession, pl. 41. cites 8 H. 6. 13.

3. Nient dedire is not so strong as confession. Br. Confession, pl. 37. As in debt upon an obligation of 10l.
the defendant confessed all except 40s. of which he shew'd acquittance, and the plaintiff pray'd judgment, and said nothing to the acquittance, and well; for per tot. Cur. if he had confessed the acquittance the writ had been abated; for it is *ill in parcel*, which goes to all upon confession, contra elsewhere upon verdict quod debet 8l. and to the 40s. non debet; by which he recovered 8l. and by his nient dedire was barr'd of the rest, and amerc'd. Br. Confession, pl. 37. cites 3 H. 6. 48. Ibid. pl. 63. cites S. C.

4. Debt of 20l. the defendant pleaded bar to 10l. and to the rest said nothing; by which the plaintiff recovered the 10l. immediately, and damages and costs remained till the bar be try'd; and so note recovery upon nient dedire. Br. Confession, pl. 20. cites 22 H. 6. 47. [554

(C) *Aided by it, Who? Strangers.*

In writ of assise against two, the one reversed the outlawry in the assise by writ of error, and the plaintiff was warned and appeared, and could not deny the error, by which the outlawry was reversed against him inasmuch as the disseisin was found with force, and the defendant outlawed by error &c. and in another writ of error by the other upon the same error, he had the outlawry reversed without warning the plaintiff in the assise, by reason of his nient dedire against the first; for it was upon one and the same disseisin; quod nota, quia mirum! Br. Confession, pl. 11. cites 7 H. 4. 39.

[For more of Nient Dedire in general, see Etloppet (D. 2) and other proper Titles.]

Night.

(A) What may be done in the Night.

Ibid. cites Pasch. 26 Eliz. B. R. S. P. between Samms & al. But the doubt was because the condition

1. **D**EBT upon an obligation conditioned to stand to an award, so as it be made before the 9th day of October &c. and it was made the 8th day of October at 10 of the clock in the night; and ruled good; for dies naturalis comprehends the day and night. Cro. E. 43. in case of Green v. Ardene, cites it to be so adjudged between Franklin and Davies, Intratur Mich. 12 & 13 Eliz. Rot. 1330. B. R.

was, ready to be delivered to the parties requiring the same; and it was not a reasonable time to require it in the night.—S. P. Cro. E. 676. Trin. 41 Eliz. Withers v. Drew.—*Ibid. cites 33 Eliz. Sparrow's Case acc.*

2. If in a præcipe quod reddat the sheriff summon'd the defendant upon the land in the night time; such summons is meerly void; per Rhodes. Le. 57.—So in a formedon in remainder. Cro. E. 42. Green v. Ardene.

3. Livery made in the night by virtue of a letter of attorney to deliver seisin was said per Fleetwood to have been adjudged good. Cro. E. 43. Mich. 27 & 28 Eliz. B. R. in Case of Green v. Ardene.

4. Things done in the night, where the personal attendance of

of another is not requisite, are good. Cro. E. 676. Trin. 41 Eliz. B. R. in case of Withers v. Drew.

5. Neither upon a cap. Excom. nor for any other cause, unless for treason or felony, is it lawful for any to break an house in the night. Cro. E. 741. Hill. 42 Eliz. C. B. Smith v. Smith.

[For more of Night, see Distress (O) and other proper Titles.]

(A) Night-walkers.

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1. 13 E. 1. Stat. 2. cap. 4. **E**Nacts, that if any stranger pass by the watch, he shall be arrested until morning; and if no suspicion be found, he shall go quit. S. 6. Statute of Winton. S. 7. And if they find Cause of suspicion, they shall forthwith deliver him to the sheriff, and the sheriff may receive him without damage, and shall keep him safely, until he be acquitted in due manner. S. 8. And if they will not obey the arrest, they shall levy hue and cry upon them, and such as keep the town shall follow with hue and cry with all the town, and the towns near, and so hue and cry shall be made from town to town, until they be taken and delivered to the sheriff as before is said; and for the arrestments of such strangers, none shall be punished.

it appear, that he is a person of good reputation. 2 Hawk. Pl. C. 77. cap. 12. S. 20.—80. cap. 13. S. 6. S. P.—Br. Trespas, pl. 268. S. P. cites 4 H. 7. 1, 2.—And if a watchman be killed in staying night-walkers, it is murder. Cro. J. 280. Pasch. 9. Jac. B. R. in Mackale's Case.

Serjeant Hawkins says, it is held by some, that this statute was made in affirmance of the common law, and that any private person may lawfully arrest a suspicious night-walker, and detain him till he make

2. 5 E. 3. cap. 14. S. 1. Item, whereas in the statute made at Winchester, in the time of King Edward, grandfather to the King that now is, it is contained, that if any stranger pass by the country in the night, of whom any have suspicion, he shall presently be arrested and delivered to the sheriff, and remain in ward till he be duly delivered.

S. 2. And because there has been divers manslaughters, felonies, and robberies done in times past by people that be called roberdesmen, wasters, and draw-latches.

S. 3. It is accorded, that if any man have any evil suspicion of such, be it by day or by night, they shall be incontinently arrested by the constables of the towns.

S. 4. And if they be arrested within franchises, they shall be delivered to the bailiffs of the franchise; and if in guildable, they shall

shall be delivered to the sheriffs, and kept in prison till the coming down of the justices designed to deliver the gaol.

S. 5. *And in the mean time the sheriffs or bailiffs of the franchises shall enquire of such arrests, and at the coming of the justices return their enquests before them with that which they have found, and the cause of the takings with the bodies, and the justices shall proceed to the deliverance of such persons arrested, according to the law.*

S. 6. *And in case that the sheriffs or bailiffs of the franchises have not inquired of such arrests, they shall be amerced, and nevertheless the justices shall make enquiry, and further proceed to the deliverance, as before is said.*

Hawk. Pl.
C. 132. cap.
61. S. 4.

3. In trespass of assault, battery, and imprisonment, the defendant justify'd as constable, for arresting him in a suspicious house with a woman of ill fame, to make him find surety of his good behaviour; and a good plea by all the justices, and so of night-walkers, and may make his neighbours aid him to do it. Per Cur. Br. Trespas, pl. 432. cites 13 H. 7. 10.

4. Such as go abroad in the night, and sleep in the day, are said to be indictable in the sheriff's torn. 2 Hawk. Pl. C. 67. cap. 10. S. 59.

[For more of Night-walkers, see Good Behaviour, and other proper Titles.]

1. **NIL** dicit is a failing to put in an answer to the plea of the plaintiff in an action by the day assigned; and judgment shall pass against him that fails, because he says nothing to the contrary; and this is always peremptory and bar to the action for ever. Reg. Plac. 138, 139. cap. 4.

Br. Confession, pl. 64.
cites 8 H. 6.
8. S. C.—
Br. Default,
pl. 36. cites
8. S. C.

2. The plaintiff cannot condemn the defendant by a nil dicit, unless where the defendant appears, and the plaintiff declares; for the defendant is not bound to answer but where the plaintiff declares, which cannot be without appearance; for the answer shall be made to the declaration; Quod Nota. Br. Confession, pl. 16. cites 8 H. 6, 7.

Br. Confession, pl. 64.
cites 8 H. 6.
8. S. C.—
Br. Default,
pl. 36. cites
8. S. C.

3. And where the defendant appears, and thereupon disavows his attorney or bailiff, as in assise, and says that he will not appear to the action, there he cannot be condemned by nil dicit. Quod nota. Ibid.

4. The Court will not reverse a judgment which is given upon a nil

a nil dicit, and by the rules of the Court. *But by the consent* of the plaintiff and defendant, the Court will grant a *repleader* in the case. Reg. Plac. 139. cap. 4.

5. On a *nil dicit* judgment is to be given *instanter*. 11 Mod. 2. Pasch. 1 Ann. B. R. Anon.

[For more of *Nil Dicit*, see Amendment, Error, Judgment, (B. a) and other proper Titles.]

(A) Nil Habuit in Tenementis.

1. **D**EBT upon a lease for years, the defendant said, that the plaintiff nothing had in the land at the time of the demise &c. and the plaintiff said, that W. T. was seised in fee, and infeoffed two in fee to the use of the plaintiff who were seised accordingly, and so seised the plaintiff made the lease, & *de hoc ponit se super patriam*; quod vide the issue where the plea of the defendant is in the negative. Br. Issues joins, pl. 89. cites 2 H. 7. 4.

Br. Pleadings, pl. 162. cites S. C.—Heath's Max. 97. chap. 5. cites S. C.

2. A. grants a lease for years to B. and then by indenture grants a second lease to begin presently during the first lease. A. brings *wast* against second lessee, and counted of a lease made for years, without speaking of the indenture. The Court thought it would be dangerous to plead no *wast*. Then it was demanded, if defendant plead that the plaintiff had nothing tempore dimissionis, whereof he had counted, if the plaintiff might estop the defendant by the indenture, tho' he had not counted upon it, and if such replication be not a departure; and Periam J. and Leonard Custos Brevium, thought not; for it is not contrary to the declaration, but does rather enforce it. Le. 156. pl. 220. Mich. 31 Eliz. in C. B. Anon.

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3. Error of a judgment in the Common Bench, where G. brought an action of *debt for rent reserved upon a lease for years made by himself*; the defendant pleaded, that the plaintiff *nihil habuit in tenementis prædict. tempore dimissionis prædict.* The plaintiff says, *quod habuit in tenementis prædict.* And thereupon being at issue, and found for the plaintiff, and judgment for him, it was now assigned for error, that this replication was not good; for he ought to have shewn to the Court, what estate he had tempore dimissionis, so as the Court might adjudge, that he had good authority to demise; and the replying generally, *quod habuit &c.* is not good, nor is any issue, and therefore the judgment erroneous; and all the Court

S. C. Yelv. 227. adjudged; and says, that the lease was not by indenture. —2 Bull. 41. S. C. but instead of its being an action of debt, it is there reported as an action of covenant by the lessee for not

making a lease, setting forth that the defendant the lessor nihil habuit whereof to make a lease according to his covenant, to which the defendant

Court held, that the replication was not good, and that the defendant might well have demurred for that cause. *But the defendant having joined issue, and the verdict finding for the plaintiff, it is now an issue; and the verdict has made the replication good; for the Court is now ascertained that the plaintiff had good authority and estate to demise; wherefore the judgment was affirmed.* Cro. J. 312. Mich. 10 Jac. B. R. Gyll v. Glas.

pleaded, quod habuit unde; and the jury found quod habuit unde, and what estate he had therein, and so judgment for the plaintiff, and error assigned that no good issue was joined the plea being bad, and so the issue bad too; but the whole Court held it made good by the verdict, and affirmed the judgment.—Jenk. 340. pl. 97. S. C. according to Croke and Yelverton, and says, that the defendant might have demurred.

S. C. cited by Ventris J. 2 Vent. 69.—So in debt for rent reserved upon a lease by indenture; the defendant pleaded nil habuit &c. tempore &c. The plaintiff demurred generally; and judgment upon the first

4. In an action of covenant upon an indenture made by the wife defendant, whilst she was sole, to the wife of the plaintiff, whereby she, reciting that she was seised in fee of certain lands, in consideration of a marriage to be had between the plaintiff and her son, did grant to the plaintiff a rent charge out of those lands to have after the death of her son, and covenanted to pay it &c. The defendant pleaded that she had nothing in the land at the time of the grant, but that a stranger was seised of it. And upon demurrer it was adjudged for the plaintiff, both because the defendant is estopped by the deed, and that the covenant extends to it and is an annuity; absque argumento ad motionem Mri. Prestwood. All. 79. Trin. 23 Car. Newton & Ux. v. Weekes & Ux.

argument was given for the plaintiff, per tot. Cur. for this is no plea against the estoppel by indenture. 3 Lev. 146. Mich. 35. Car. 2. in C. B. Heath v. Vermuden.

5. Assumpsit, and declared that in consideration that the plaintiff and his wife at the defendant's request would convey to C. coffin and heir of M. their estate in certain lands in H. which were the said M's by such ways as the said C. should appoint, he promised to pay to them 50l. And whereas the plaintiffs at the defendant's request had promised to convey the said tenements to the said C. by such ways as he should appoint, he promised to pay to them another 50l. and said that they have been always ready to convey; but C. never requested. The defendant pleaded, that at the time the plaintiffs, nor any of them, had any estate in the lands; the plaintiffs demurred; and thereupon the plaintiffs entered a nolle prosequi upon the second promise, and had judgment upon the first; upon which error was brought and assigned, that here was no consideration, the plaintiffs not having any estate as is confessed by the demurrer; but by all the Court, it is good; for the bargain was for such estate as they had, and they might have a right extinguishable by release, tho' they had not any estate; and they affirmed the judgment. 2 Lev. 33. Hill. 23 & 24 Car. 2. Woolnough and Ux. v. Viridon.

6. In *covenant upon a deed poll*, the count was of a lease rendering rent and covenant to pay it, and assigned the breach in non-payment, the *defendant protestando*, that he did not enter nor occupy as the plaintiff supposed, *pro placito dicit*, that the plaintiff nil habuit in tenementis; the plaintiff *replied*, that he *bonum habuit titulum unde potuit dimittere*; the defendant demurred generally, and the Court on the first argument held the replication ill, *not shewing what title he had*, according to the case of Cro. J. 312. [supra] and this notwithstanding that it was not by indenture, and tho' it was objected that that case was in debt for the rent, but this case is a *covenant collateral to the reservation of the rent*, whereas in Gill and Glas's case if there was no lease, there could be no reservation, but that collateral covenant to pay may be where no lease is; but per Cur. it is all one; for if there be not any rent, there cannot be any covenant for payment of the rent, but *one depends upon the other*, and so it was remembered to have been adjudged, Mich. 13 Car. 2. B. R. in the case of * Caponhurst v. Caponhurst; * 1 Lev. 45. whereupon the plaintiff perceiving the opinion of the Court to be against him, prayed leave to discontinue in order to bring a new action, and it was granted. 3 Lev. 193. Mich. 36 Car. 2. Aylet v. William.

7. In *covenant* the plaintiff declared of an agreement for a lease for 99 years of a mesuage &c. under a certain rent, and such usual covenants as in all demises granted by the trustees of the Earl of Rochester were used; *omnium quorum consideratione* the defendant agreed to pay the plaintiff 180l. at Michaelmas following, and tho' the plaintiff had performed all of his part the defendant had not paid the money &c. The defendant pleaded that the plaintiff had nothing in the premises at the time; plaintiff demurred, and judgment was given by the whole Court for the plaintiff; for tho' it may be pleaded in action of *debt for rent*, yet it cannot be pleaded in *covenant for a sum in gross*; besides the agreement does not necessarily import that the lease should be made by the plaintiff; it may be understood to be agreed that he should *procure a lease for the defendant*. 2 Vent. 99. Mich. 1. W. & M. in C. B. Clarke v. Peppin.

[For more of Nil Habuit in Tenementis, see Trial, Fine, and other proper Titles.]

(A) Nobility.

1. **I**N the Saxon times the earls of counties being officary were elected by the freeholders in their folkmotes, and were removeable for male-administration. 2 Salk. 509. in Marg. cites

cites L. L. Edw. c. 35. L. L. Edgari c. 5. L. L. Canuti c. 17. and Saxon Chron. Sub. Anno. 1055.

2. Before the time of 11th Edw. 3. there were *but two titles* of nobility, viz. earls and barons; *barons were originally created by tenure, afterwards by writ, and last of all by patent*, viz. about the 11 R. 2. As to earls, they were first created by *letters patents*; and an earldom consisted in office for the defence of the kingdom. See Bract. lib. 1 c. 8. † Comites had their names not from counties but a comitādo Regem. 9 Rep. 49. *it may be intailed as any office may within Westm 2.—And earldoms consist of rent and possessions, which were anciently great.* See Mag. Chart. the relief is 100l. per Holt Ch. J. 2 Salk. 509. Trin. 6 W. & M. B. R. King and Queen v. Knollys.

† 2 Brownl.
319.—Sti.
186.

● S. P. But that Aubrey de Vere was the first marquis in 11 R. 2. And that none of these dignities are above an earl in degree, but only in precedency;

and in old time none were earls but only those that were of the blood royal, and therefore are called *consanguinei regis*; and at their creation the King gives them a robe and a cap, which signifies counsel, and a coronet which signifies the greatness of the blood and honour, and also sword, ut sit in utrumque tempus [paratus.] as well ready for peace as war; per Coke Ch. J. 2 Brownl. 335. Pasch. 8 Jac. C. B. in the Earl of Rutland's Case.

4. Per Coke Ch. J. the dignities before the conquest were *not patrimonial to descend*, which Dodderidge the King's serjeant affirmed, and he said he had seen charters before the conquest with the additions of *dukes* and earls. Noy. 147. in case of Andrewes v. Webb.

5. If the King give land to one and his heirs *tenend' de rege per servitium baroniæ*, he is no lord of Parliament until he be called by writ to the Parliament. These which are earls and barons have offices and duties annexed to their dignities of great trust and confidence, for two purposes, 1. *Ad consulendum tempore pacis.* 2. *Ad defendendum regem & patriam tempore belli*; and prudent antiquity hath given unto them two *ensigns*, to resemble and to put them in mind of their duties; for first they have an honourable and long robe of scarlet, resembling council, in respect whereof they are accounted in law, De magno concilio Regis. 2. They are girt with a sword, that they should ever be ready to defend their King and country; and it is to be observed, that in ancient records the barony (under one word) included all the nobility of England, because regularly all noblemen were barons, tho' they had a higher dignity;

nity; and therefore of the charter of King E. 1. the conclusion is, *testibus archiepiscopis, episcopis, baronibus, &c.* so placed, in respect that barons included the whole nobility; and the great council of the nobility, when there were besides earls and barons, dukes and marquesses, were all comprehended under the name *de la council de baronage.* 2 Inst. 5. 6.

6. A. the grandfather was called to Parliament by writ 3 H. 8. A. died and then B. his son was summoned to Parliament several times by writ, and after was disabled by Act of Parliament to claim any dignity &c. by descent, remainder, or otherwise; B. died leaving C. his son; C. was afterwards called to Parliament by Queen Elizabeth by writ, and sat as youngest lord and died, leaving D. his son; upon a petition by D. to be restored to the seat of A. his great grandfather; it was resolved by the justices, upon a reference to them by the committees, 1st. That this being only a personal and temporary disability, and not an absolute and perpetual one, it being without any attainder, he may claim as heir to such disabled ancestor, or to any ancestors paramount him. 2d. That the acceptance of a new creation by C. cannot hurt D. because C. was disabled at the time, and in truth was no lord, but an esquire only, so that the old and new dignity descending together, the old shall be preferred. These resolutions were approved by the lords in Parliament, and confirmed by the Queen, and thereupon D. was accordingly conducted to his said seat. 11 Rep. 1. Anno. 39. Eliz. Lord Delaware's Case.

[For more of Nobility, see Peer, and other proper Titles.]

Nonsense.

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(A) The Effect thereof.

1. **I** And my wife now have heirs and assigns by these presents by the will aforesaid do own full power, good right and lawful authority to sell &c. This is a good covenant to charge the defendant; the words (heirs and assigns) are *surplusage* and so void, and for the words (*do own*) a man may be owner of a power as well as owner of land, adjudged. Roll. Rep. 84. Mich. 12. Jac. B. R. Goodman v. Knight. And in assigning the breach the insensible words were omitted, and held well. Cro. J. 358. S. C. 3 Bull. 153. S. C. Mo. 848. S. C.
2. If the rent be behind it shall be lawful for him to restrain and not being sufficient the ground to re-enter into the said demises, and the same to have again in his former estate; 'tis no good condition. Roll. R. 267. Pasch. 14 Jac. B. R. Moody v. Garnon.

3. Where

Godb. 434.
S. P.

3. Where a matter set forth is *grammatically right but absurd* in the sense, and unintelligible, we cannot reject some words to make sense of the rest, but must take them as they are; for there is nothing so absurd and nonsensical, but what by rejecting and omitting may be made sense; but where a matter is nonsense by being contradictory and *repugnant* to somewhat precedent, there the precedent matter which is sense shall not be defeated by the repugnancy which follows, but that which is contradictory shall be *rejected*; as in ejectment where the declaration is of a demise the 2d of January, and that the defendant postea, scilicet the 1st of January, ejected him; here the *scilicet* may be rejected as being expressly contrary to the postea, and the precedent matter; per Holt Ch. J. 1 Salk. 324. Trin. 2 Annæ B. R. Wyat v. Aland.—But per Powel J. *words unnecessary* might in construction be omitted or rejected, tho' they are not repugnant or contradictory, but in *cæteris omnibus* agreed with the Ch. J. Ibid.

[For more of Nonsense; see *Blunders, Mistake of Words, Obligations,* and other proper Titles.]

Nonsuit.

(A) *In what Actions* it may be [and in what Cases:]

S. P. Br.
Error, pl.

11. cites 20

H. 6. 18.—Br. Nonsuit, pl. 3. cites S. C.—D. 262. b. pl. 32.—329. pl. 14.—See *False Judgment* (G).

Lat. 110.
resolved.

Cole's Case.

—† It

should be 20 H. 6.—Br. Error, pl. 6. S. P. cites 9 H. 6. 13. but Brook makes a quære thereof; for it is only a writ to remove the record and to examine the matter. But in *scire facias ad audiendum errores* he may be nonsuited, and then it seems the matter is at an end.—S. P. Ibid. pl. 11. cites 20 H. 6. 18. but that in a writ of error he cannot be nonsuited, because he has no day in Court; quod non negatur, but it is not expressly ruled. Br. Nonsuit, pl. 3. cites S. C. and says nota, that it was in a manner agreed for law, and for that reason.—Br. Nonsuit, pl. 2. cites 9 H. 6. 13.

[561] *Writ of error* was brought and *scire facias ad audiendum errores*, and [the plaintiff] was nonsuited, and after brought another writ of error and *scire facias* and had judgment of execution; and so see, and quære if the nonsuit be intended to be upon the writ of error, or upon the *scire facias*. Br. Nonsuit, pl. 15. cites 9 H. 6. 13.—Br. Nonsuit, pl. 56. cites S. C. and

and had superedeas upon the second writ of error, because he had no superedeas on the first. — Br. Error, pl. 82. cites 15 E. 4. 18 S. P. That a man was nonsuited in a writ of error. — Br. Nonfuit, pl. 30. cites 15 E. 4. 18. S. P. and 26 H. 6. 7. — Br. Nonfuit, pl. 63. cites 6 H. 7. 26. S. P. but there is no mention of Scire facias.

[3. If the *plea* be returned out of ancient demesne, because the tenant claims to hold at common law, and the demandant in the original does not come there at the day, the tenant shall go quit of this writ, and it shall be a nonfuit in the Lord's Court, tho' the original ne fait cyeins. * 27 E. 3. 77.]

* Quere the Book; for there is no such Page as 77.

[4. If at the day of the return of an *assise* no pledges are returned for the plaintiff, yet he may be nonsuited; for he has day in Court, and the writ is served by a manner. 21 C. 3. 54. b 21 Aff. pl. 11.]

5. In account the defendant was outlawed, upon which the defendant sued charter of pardon and scire facias against the plaintiff, and the sheriff returned nihil, and sicut alias issu'd, and he returned the like, by which it was awarded that the plaintiff should be nonsuited. Br. Nonfuit, pl. 4. cites 45 E. 3. 16.

6. If a man be taken upon *capias utlagatum*, and they are at issue upon mistake of the vill, the party shall not be suffered to be nonsuited, for the interest of the King; per Brown Prothonotary. Br. Nonfuit, pl. 23 cites 21 H. 6. 21.

7. If the plaintiff after that the defendant is awarded to account in writ of account, and is at issue before auditors, who certify it to the justices in C. B. he cannot be nonsuited; but if he makes default after he shall be barr'd and the defendant discharged of the account. Br. Nonfuit, pl. 25. cites 21 H. 6. 26. per Brown.

But if a man be adjudged to account, who is not present, *capias ad computandum* shall issue, and upon this re-

turned, if the defendant appears and the plaintiff makes default, he shall be nonsuited. Br. Nonfuit, pl. 41. cites 1 H. 7. 2. per Townsend.

8. If *replevin* be sued by writ and removed by *pone* or *recordare*, [or] if the *replevin* be by *plaint*, in both cases it is said to the plaintiff, that he be here such a day &c. in which case if he does not come he shall be nonsuited; per Newton. Br. Nonfuit, pl. 28. cites 21 H. 6. 30.

9. A man was outlaw'd by name of J. G. husbandman, who came and said, that the day of the writ purchased he was *hostler* and not husbandman, and scire facias was awarded against the party, who came and maintained that he was a husbandman, and so to issue. And per Cur. the plaintiff cannot be nonsuited here; for the original was determined before; for in this case the plaintiff does not declare, and if the issue be found for him nothing shall be done but award the defendant to the fleet, and if it be found against him, it shall be awarded that he shall take nothing by his writ. Br. Nonfuit, pl. 29. cites 21 H. 6. 50.

But if the defendant sues charter of pardon and has scire facias against the party, in this case the plaintiff ought to declare against him, because by the charter, the original is revived,

and there if they are at issue the plaintiff shall recover or be barr'd, as the case is; and the reason why he shall recover upon scire facias upon charters upon the issue found for him is, because by the statute of 5 E. 3. 12. he pleads upon the original by the statute, therefore he shall recover; contra

in the other case which is at common law. Br. Ibid.—Br. Peremptory, pl. 29. cites S. C.—But per Widdlad Prothonotary in such like case as above, 22 H. 6. 7. upon scire facias against the plaintiff in case as above, and upon scire facias upon charter of pardon after outlawry if a writ be returned the plaintiff shall be demanded, and if he does not appear he shall be nonsuited. Br. Nonfuit, pl. 29.

Where a statute gives action, as maintenance decies tantum &c. which were not at common law before,

10. It was agreed, that in *decies tantum* the plaintiff may be nonsuited, and then the King shall not have advantage of this suit but by indictment or otherwise; and therefore it seems that he who sues *tam pro Domino Rege quam &c.* may be nonsuited. Br. Nonfuit, pl. 35. cites 37 H. 6. 4. and book of Entries.

fore, it seems that the party may be nonsuited and have a new action; and traverse is in lieu of action. Br. Traverse de Office, pl. 16.

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11. But not in a *prohibition* if there be no other process; per Doderidge and Jones J. Lat. 115. Pasch. 2 Car. B. R. in Watkin's Case.—Palm. 422. Dire v. Brown, but S. C. and S. R. of Watkins.

12. On a *certiorari* of replevin in C. nonsuit was excepted against here after a suggestion made; but per Cur. it may be here as well on *certiorari* as on *recordare &c.* and if the party be grieved by the writ of enquiry, he may have a second deliverance; and the nonsuit stood. 3 Keb. 563. Mich. 27 Car. 2. B. R. Harvey v. Harris.

13. Plaintiff is demandable on the return of the *writbernem*, and may be nonsuited for not appearing. 2 Salk. 583. Mich. 12 W. 3. B. R. Moor v. Watts.

14. In *ejectment* against several, if some confess lease &c. and others do not, the plaintiff may go on as to the former and be nonsuit as to the later. 2 Salk. 456. See Pasch. 4 Ann. B. R. Greeves v. Rolls.

(B) *What Persons may be nonsuited, what Persons in respect [of being Actor &c.]*

[1. **N**O person may be nonsuited, *unless he has action pleading in the Court where &c.* 22 E. 4. 10.]

[2. But he who does not bring the action, but *upon pleading becomes actor against the other* cannot be nonsuited. 22 E. 4. 10.]

* S. P. Br. Nonfuit, pl. 50. cites S. C.—† S.

P. Br. Nonfuit, pl. 50. cites S. C.

—† S. P. Br. Nonfuit, pl. 50. cites S. C.

[3. *As the avowant* cannot be nonsuited. * 22 E. 4. 10.]

[4. *Garnishee* cannot be nonsuited yet he is actor. † 22 E. 4. 10.]

[5. A man *outlawed has charter of pardon*, and sues *scire facias* against the party, he is actor, yet he cannot be nonsuited. † 22 E. 4. 10.]

[6. If a man *traverses an office* he cannot be nonsuited, yet he is actor but *has not original pending against the King*, 22 E. 4. 16. But see 3. 4. Ma. Dy. 141. 47.]

Br. Nonfuit, pl. 50. cites S. C. per Hully and Fairfax; for

when a perfect verdict is given, to which he has taken traverse, he cannot be nonsuited.

[7. A nonfuit *recorded in this case*, but it is there a quære, whether receivable. 11 H. 4. 52. b. Quære.]

Petition to the King for land to which he was intitled by the inquest upon

[8. But in a *petition of right* against the King the plaintiff may be nonsuited. 11 H. 4. 52. b. adjudged.]

the attainer of the lord of Northumberland, and also it was enacted by parliament, that he should forfeit all his lands in use and possession, and the plaintiff had commission to inquire of his right, and found for him, and upon this the inquest, which found for the King, was traversed in Chancery, and the points in the last inquest found for him, and when the inquest upon the traverse was ready to give verdict, the plaintiff was nonsuited, by which the nonsuit was admitted, and the inquest was discharged; quod nota; and by the opinion there, he may have another traverse. Br. Nonfuit, pl. 12. cites 11 H. 4. 52. — S. P. Br. Petition, pl. 14. cites 4 H. 6. 12. — S. P. Br. Traverse d'Office, pl. 16. cites 4 H. 6. 12.

[9. In *audita querela* to avoid a statute the plaintiff may be nonsuited; for he is plaintiff in this action. 47 E. 3. 5. b.]

[10. If upon two *nihils* returned in *scire facias* upon charter of pardon plaintiff does not appear, he shall be nonsuited; for the statute is that if he had appeared, that he ought to count against the defendant. 45 E. 3. 16.]

(B. 2) For what.

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1. [IN *præcipe* quod reddat the demandant appeared by attorney, and because the warrant of attorney and the writ did not agree, a nonsuit was awarded. Br. Nonfuit, pl. 5. cites 45 E. 3. 24.

2. A man brought debt in bank, and pending it arrested the defendant upon plaint in London, and corpus cum causa was awarded and returned, by which the plaintiff was demanded and did not come, wherefore nonsuit was awarded and the defendant to go at large, and was not remanded. Br. Nonfuit, pl. 13. cites 12 H. 4. 21.

3. If the plaintiff will not proceed upon his declaration as he ought to do by the rules of the Court, the defendant may nonsuit him. 2 L. P. R. 232. cites Mich. 1649. B. S. Quære.

4. It was moved for the defendant to have the rule of Court for the plaintiff to bring in the *postea*, that the defendant may move in arrest of judgment; the Court answered they would make no rule; for the defendant may give rules in the office to force him to it, and if he will not bring it in, he is to be nonsuited. Sty. 238. Mich. 1650. B. R. Hunt v. Popham.

5. Upon a trial to be had at bar the plaintiff would not put in his writ that the trial might go on, whereupon Roll Ch. J. bid the crier to call the attorney of the plaintiff to appear, and

to bring in the writ upon pain of 20l. and said that if he brought it not in, he should be put out of the Roll, Serjeant Maynard moved, that if he brought not in the writ the plaintiff might be called nonsuit upon the record, which Roll Ch. J. answered might well be, because the parties have day in Court by the record or roll; afterwards the solicitor who had the writ brought it in; yet Roll Ch. J. said, there shall, notwithstanding the writ be brought in, be 20l. fine set upon him for his trifling with the Court. Sty. 449. Pasch. 1654. B. R. Pilkington v. Bagshaw.

S. C. and tho' the process never was returned, yet because plaintiff did not declare within two terms it was good. 2 Salk. 455. Trin. 1 Anne. B. R. Cooke v. Foster.

6. One took out a writ, and the *defendant voluntarily appeared* and gave notice to the plaintiff's attorney of bail filed; the *plaintiff does not declare*, defendant signs non-pros. for want of a declaration, and Holt held it well enough. Farr. 32. Foster's Case.

(C) Who may be nonsuited.

Infant sues by prochein amy and there is no entrance of

the admission; it is no error; but if the defendant had demanded the plaintiff, he might have been nonsuit for not coming at first, and such appearance of the plaintiff is void. Comb. 331. Read v. Waldron.

[1.] *If an infant brings assise by guardian, tho the infant disavows the suit in proper person, yet no nonsuit shall be awarded.* 39 Aff. pl. 1.]

Fol. 131.

2. *The King cannot be nonsuited, because in judgment of law he is always present in Court.* Co. Litt. 139. b.]

S. P. Br. Nonsuit, pl. 68. cites 25 H. 8.—Br. N. C. 25. H. 8. pl. 80.—S. P. Sav. 56. pl. 119. Weare v. Adamson.—S. P. But the King's Attorney qui sequitur pro domino rege may enter an ulterius non vult prosequi which hath the effect of a nonsuit. Co. Litt. 139. b.—*But he who sues as well for the King as himself may be nonsuit.* Br. Nonsuit, pl. 68. cites Lib. Intrat.—pl. 35. cites ut ante.—Br. N. C. 25 H. 8. pl. 80. says that it seemed so to Brook.—S. P. Co. Litt. 139 b.

[564] 3. *The King of Spain hath been nonsuit in England; Mich. 22 Car. B. R. and this stands with reason; for if a foreign prince will take the benefit of the national laws here he must proceed and stand to the rules and orders of the Court wherein he prefers his actions.* 2 L. P. R. 232.

(D) At what Time [a Man] may be nonsuited.

See (E) pl. 3, 4, 5, &c. —(I)

[1. **T**HE plaintiff cannot be nonsuited *the same day that he is seen in Court.* 3 H. 4. 2. Contra 23 Aff. 4. Adjudged.]

[2. If the defendant *wages his law*, [and] *is ready to make it immediately*, the plaintiff cannot be nonsuited. H. 41 Cl. B. k. Between Ewar and Parton.]

[3. *But*

[3. But if the defendant takes a day over to make his law, at the day the plaintiff may be nonsuited. H. 41 El. B. R.]

[4. If defendant be adjudged to account and auditors assigned upon *capias ad computandum*, the plaintiff cannot be nonsuited after in the original. For the original is determined. 3 H. 4. 7. 21 E. 3. 7. 21 H. 6. 26. 1 H. 7. 1. b. Contra 27 E. 3. 87. Contra Co. Lit. 139. b.]

In account; if the defendant is awarded to account, the plaintiff after this cannot be non-

sued; for this award is a judgment, and a man cannot be nonsuited after judgment. pl. 17. cites 21 E. 3. 7.—Co. Litt. 139. b. (p) Contra, that he may be nonsuit; diversity between an interlocutory award of the Court, and a final judgment.

Br. Nonsuit, and so note a

[5. In debt, if defendant *imparles*, and the same term wages his law ready to make it immediately, the plaintiff shall not be nonsuited, if he makes default upon demand, but shall be barred. 3 H. 6. 13. b. 8 H. 6. 10. b.]

Br. Nonsuit, pl. 27. cites S. C.—Br. Jours, pl. 28. cites S.

[6. But if a man wages his law, and has day till another term to make it, at this day the plaintiff may be nonsuited. 3 H. 6. 13. b.]

C.—The reason why the plaintiff was not suf-

[7. So if he has day to make his law the same term, the plaintiff may be nonsuited at this day. 3 H. 6. 13 b. Dubitatur.]

fered to be nonsuited was, because

[8. If a man at the first day wages his law, and is ready to make it immediately, the plaintiff cannot be nonsuited. 14 H. 4. 16. 19. b. 3 H. 6. 13. b.]

his appearance was of Record the same term, but Brook says, quod mirum after imparlance, and says,

[9. So if defendant wages his law ready to make it immediately, and plaintiff *imparles* till a day of the same term, at this day the plaintiff cannot be nonsuited. † 3 H. 6. 50. Curia.]

that it seems the imparlance was not entered, or that the imparlance was to the same day; for it is agreed, that if a man appears when the jury appears, yet he may be nonsuited when he comes with verdict the same day; but in common recoveries for assurance, [if] the vouchee *imparles* and is demanded the same day, and makes default, judgment is given that he depart in contempt of the Court, and so he loses the land demanded of this part; but of the part of the plaintiff the case is ruled ** 9 H. 5. 5. that he shall be demanded at the day of imparlance where it is at another day though in the same term, and may be nonsuited, and no difference where the imparlance is in the same term, or another term, so that it be at another day, but otherwise if it be the same day; and with this agrees 3 H. 4. 2. if it be the same day, and contra upon imparlance to another day, and see above that the case of the vouchee is the same day; for it seems if it was to another day, petit cape should issue, and it should not be departure in despatch. Nota. And so see, that where a man *imparles*, and this to no day certain, as above in the principal case, there all the term is one and the same day, [in which] he is not demandable, and therefore he shall not be nonsuited in this term. So where he *imparles* the same day, and not to any day certain; but when he *imparles* to any day certain, be it to a day in the same or any other term, it is all one, and he is demandable, and then may be nonsuited, and not in other cases. Br. Nonsuit, pl. 1: cites 3 H. 6. 13.—† It is (one) in all the editions of Brook, but quere if it should not be (oyer).

A. brings debt against B. and B. *imparles* till the morrow, and then A. is demanded, and does not appear; he shall be nonsuit. Jenk. 80. pl. 58.

** Br. Nonsuit, pl. 14. cites 9 H. 5. 5.—Br. Jours, pl. 23. cites 9 H. 5. 5.

† Br. Nonsuit, pl. 1. cites S. C.—Pl. 52. cites 47 H. 3. 16. and 3 H. 6. 49.

[10. But otherwise it had been if the imparlance had been till another term. 3 H. 6. 50. Curia.]

11. 12 E. 2. cap. 4. S. 1. Enacts, that the Justices or the Justice, shall have power to record nonsuits and defaults in the country, at the days and places assigned.

S. 2. And that which they shall have done in the things above-mentioned

mentioned shall be reported in the bench at a day certain, there to be inrolled, and thereupon judgment shall be given.

S. 3. And the King intends not that the said inquests and jurors should not be taken in the bench if they come, nor that this statute should extend to great assises.

S. 4. Also one justice of the one place and of the other being associated with a discreet man of the country, knight, or other, at the request of the plaintiff shall take inquest upon pleas pleaded and to be pleaded, that be moved by attachment and distress, and shall have power to record nonsuits as above is said, and to take inquests upon defaults there made.

S. 5. And as to the inquests to be taken upon writs of quare impedit it shall be done as is contained in the statute of West. 2. and the justices shall have power to record nonsuits and defaults in the country, and to give judgment thereupon, as they do in the bench, and there to report that which they have done, and there to be inrolled.

S. 6. And if it happen that the justice or justices that shall be assigned to take such inquests in the country do not come, or if they come into the country at the day assigned, yet the parties and persons of such inquests shall keep their day in the bench.

12. In assise against two the one pleaded to the writ, and the other in bar, upon which they were adjourned into bank, and there the defendant who pleaded to the writ relinquished his plea, and confessed the writ good, and the plaintiff appeared, and said, that he shall not be received to it, and the Court was against him. And the plaintiff was demanded, and was nonsuited by the opinion of the Court, and was suffered notwithstanding that he had appeared before, and demanded judgment of the plea as above; Quod Nota. Br. Nonsuit, pl. 37 cites 23 Ass. 4.

13. In trespass at the day of exigent, the defendant appeared by supersedeas by mainperners, and the sheriff did not return the writ, and yet the plaintiff was demanded by the roll, and did not come, and a nonsuit was awarded. Br. Nonsuit, pl. 16. cites 38 E. 3. 20.

14. 2 H. 4. cap. 7. S. 1. Item, whereas upon verdict found before any justice of assise of novel disseisin, mortdancesor, or any other action whatsoever, the parties before this time have been adjourned upon difficulty in law upon the matter so found.

S. 2. It is ordained and established, that if the verdict pass against the plaintiff, the same plaintiff shall not be nonsuited.

After dubious verdict the plaintiff may be nonsuited; contrary after perfect verdict. Br. Assise, pl.

32. cites 47 E. 3. 1, 2.—Nevertheless, it seems that it is all one, per Brook, who cites this statute, and says it is made in affirmance of the common law. Br. Ibid.

In entry sur dissein they were at issue, and the jury was sworn, and evidence given by both parties, and then the plaintiff was nonsuited the same time before that the jury went from the bar; quod nota quod mirum! for the appearance was recorded, till the jury went and came back; for then is the plaintiff demandable again. Br. Nonsuit, pl. 48. cites 16 E. 4. 7.

* After perfect verdict a man cannot be nonsuited. Br. Nonsuit, pl. 50. cites 22 E. 4. 9. per Hulle and Fairfax.—But if an imperfect verdict be given [it is otherwise] Br. Ibid.—At an assise, if they find the seisin and disseisin, but no damages, there they shall go back, and when they return to give the verdict, there the plaintiff may be nonsuited. Br. Ibid.—2 Brownl. 119. Arg. cites S. C. accordingly, or if it finds a thing not in issue, there nonsuit may be after verdict.

* 2 Jo. 1. Hill. 22 Car. 2. contra, that the plaintiff was nonsuited after special verdict, and in the term in which the matter in law was argued at bar. Henfest y. Board.

At the common law upon every continuance or day given over before judgment the plaintiff might have been nonsuited, and therefore before this statute, *after verdict* given, if the Court gave day to be advised; at that day the plaintiff was demandable, and therefore might have been nonsuited, which is now remedied by this statute. Co. Litt. 139. b. (n)——S. P. for if he did not like his damages, he might be nonsuit. 5 Mod. 208. Pasch. 8 W. 3. Keat v. Barker.——But after demurrer in law joined, if the Court does give a day over, at that day the demandant or plaintiff is demandable, and therefore may be nonsuit; for that is not holden by any statute. Co. Litt. 139. b. (o)——S. P. As well as at the day given after the issue joined. Quod [566] nota bene. Br. Nonsuit, pl. 67. cites 38 H. 8.——Plaintiff may be nonsuited *after demurrer*. Le. 105. Mich. 30 Eliz. Bear v. Underwood.——S. P. And after *argument at the bar thereupon*. 2 Jo. 1. cites Pasch. 18 Car. 2. C. B. Rot. 336. Richfield v. Udal.

15. Hank. would not suffer the plaintiff to be demanded *the first day* to be nonsuited, but the fourth day. Br. Nonsuit, pl. 54. cites 14 H. 4. 19.——But see Brook, tit. Jour. that he shall be demanded the first day, and the nonsuit shall be *recorded the fourth day*. Ibid.

16. The plaintiff cannot be nonsuited *before pledges to prosecute found*. Br. Nonsuit, pl. 49. cites 22 H. 6. 21.

17. In trespass they were *at issue upon bastardy*, and the *bishop certify'd bastardy*, and the *plaintiff was nonsuited*; and well as it seems there, notwithstanding that it be *after certificate*; for at the common law the plaintiff might have been nonsuited after verdict, which is now ousted by the statute of *H. 4.* but this does not speak of certificate; and by reason of the nonsuit the bastardy is no estoppel, per Moyle, no more than *after the discontinuance*. Br. Nonsuit, pl. 44. cites 3 E. 4. 11.

18. When *a jury is demanded* and 8 *appear*, and *the rest not*, * he may well be nonsuited; per Littleton. Br. Nonsuit, pl. 46. cites 4 E. 4. 37. * Orig. (et est nonsuet come il soit bien)——S. P. Per Littleton, and that

he may be nonsuited before *any are sworn*. Br. Nonsuit, pl. 60. cites S. C.——For it is the *common course* to be nonsuited after the jury is demanded, † and *after that he himself has appeared also*, and yet he is not demandable at this day. Br. Nonsuit, pl. 46. cites 4 E. 4. 37.——† S. P. Br. Nonsuit, pl. 60. cites S. C.

19. In debt the *defendant appeared by cepi corpus and prayed that the plaintiff be demanded* to have him nonsuited. Per Cur. if he *does not appear* sitting the Court we will record a nonsuit. Br. Nonsuit, pl. 49. cites 22 E. 4. 1.

20. After 2 *justices had delivered their opinion* the plaintiff cannot be nonsuited any more than after a verdict. Cro. E. 410. Snelling v. Norton.

21. In debt on bond, the plaintiff pray'd he might be nonsuited, but because he had the *same term appeared and argued* by his Counsel, and had *pray'd judgment*, he could not be nonsuited the same term. Cro. J. 35. Trin. 2 Jac. B. R. Alderley v. Alderley, cited in the case of Philips v. Echard, as adjudged the same term. The Court cannot compel the plaintiff to appear and stand a verdict; but if the plaintiff appears, or

his counsel or attorney appears for him, he cannot be afterward nonsuit, but the jury must deliver in their verdict. 2 L. P. R. 231,

22. Although upon a trial the plaintiff be called to hear the verdict, and *does not appear* to hear the verdict when he is called, and thereupon the Court direct the secondary to record the nonsuit, yet if afterwards the plaintiff *appears before the nonsuit be actually recorded*, the Court may proceed to take the verdict; Trin. 1651. B. S. For it is not a nonsuit until it be recorded by the secondary, and then it is made part of the record, and is in the nature of a judgment against the plaintiff. 2 L. P. R. 232.

23. If the plaintiff be *not ready* at the trial *when the jury is called and sworn*, the Court may call him nonsuit; by Roll Ch. J. 1651. B. S. For it shall be intended he will not proceed in his cause any farther; yet sometimes the Court hath stay'd a while in expectation of his coming, and making good his action. 2 L. P. R. 232.

24. Plaintiff in *ejectment* was called and nonsuited, and this entered upon the record before the venire or distringas &c. was put in; and this appeared by the *postea* now produced; for there is only a nonsuit indorsed upon it; and so the justices of nisi prius have no power to nonsuit; for their power is by the habeas corpus; and therefore the Court discharged the nonsuit and gave leave to the party to proceed again. Sid. 164. Mich. 15 Car. 2. B. R. Thomson v. Hudsbet,

[567] 25. After two assises and two notices of trial in an information and no proceeding, on the defendant's motion there shall be a non-prof. Per Cur. 2 Show. 80 the King v. Hide.

26. Trespass against two defendants, and verdict for the plaintiff; one defendant being an infant the plaintiff took judgment against the other, and entered a non-prof. after the judgment against the infant: the plaintiff sued out execution, upon which error was brought; and it was objected, that the execution and judgment could not vary from the demand of the writ: it was answered, that torts are several, and the plaintiff may as well enter a non-prof. quoad one defendant upon a trial by verdict, as if one defendant had demurred and verdict against the other; and that a non prof. may be enter'd after judgment as well as before; and for non prof. entered after judgment, he cited 15 E. 4. 26. 14 E. 4. 6. Hob. 71. 1 Ro. Rep. 379. 2 Ro. Abr. 100. pl. 5. Holt Ch. J. said, he supposed those were interlocutory, judgments wherein it might well be, but a final judgment differed; for that being once wrong a subsequent entry would not set it right. Adjournatur, 1 Salk. 455. Trin. 12 W. 3. B. R. Lover v. Salkeld.

27. Ejectment against two, who enter into the common rule of confessing lease, entry and ouster; at the trial before a judge of nisi prius, one of them refuses to confess lease, entry and ouster, and the plaintiff enters a retraxit against him, which the Judge of nisi prius records, and goes on to trial against the other, and verdict for the plaintiff, and this being moved in arrest of judgment, it was held well by Gould and Powis against

against Holt; and error was brought before the Lords, and Judgment affirmed. 12 Mod. 651. 657. Hill. 13 W. 3. Greenv. Rolle.

28. Where there are *several defendants* and they *sever in plea*, whereupon issue is joined, the plaintiff may enter a non prof. *as to one defendant* at any time before the record is sent down to be try'd at nisi prius. 2 Salk. 457. Pasch. 4 Ann. B. R. agreed, in case of Greaves v. Rolls.

Cro. Car. 239. Walsh v. Bishop— Ibid. 243. S. C.—See Judgment F) pl. 5. S. C. by

name of Welsh v. Bishop.—S. P. adjudged and affirmed in Error. Carth. 21, cites Trebarefoot v. Greenway.

(E) *To what Time it shall relate, [and at what Time it may be.]*

[1, **T**HOUGH the plaintiff be in peace all the term till the end and then is nonsuited, it shall have relation to the return of the writ, 2 H. 4. 23. b.]

*Capias per-
ris returned,
the plaintiff
was non-
suited, and*

the same term exigent issued upon the same original in another roll, the defendants prayed remedy, and it is said that the nonsuit shall have regard to the day of the writ returned, & curia concessit, and the same day the exigent shall be said to issue. Br. Error, pl. 33, cites 2 H. 4. 23, 24.

[2. In *assise* against two, if the one pleads in bar and the other in abatement, and the plea is adjourn'd into bank, and there he who pleads in abatement relinquishes his plea and pleads in bar, and the plaintiff demands judgment, whether he shall be received to it after that they are at the assise and are adjourned. And it is adjudged by the Court, that he may plead in bar, and the plaintiff may be after * adjourned, though he had appeared and demanded judgment the same day. 23 Ass. 4. adjudged.]

* It seems it should be (Nonsuit) and so is the Year Book.

[3. After verdict against the plaintiff, if the parties are adjourned to Westminster to a certain day, at the day the plaintiff may be nonsuited. Dubitatur. 47 E. 3. 2. 47 Ass. 1]

[4. In *assise*, if upon a special verdict it be adjourned for difficulty [of saying] * for whom it is found, at the day the plaintiff may be nonsuited; for here the verdict was not expressly found against him. 17 Ass. 27. 18 E. 3. 35. 17 Ass. 28. 18 E. 3. 35. Adjudged.]

* Orig. Pur que ceo.) [568]

[5. If verdict be passed against the plaintiff at the nisi prius, at the day in bank he may be nonsuited. 47 E. 3. 2. 47 Ass. 1. Agreed.]

[6. But if defendant prays that only a nonsuit be recorded it shall be done. 47 Ass. 1. per Ingl.]

Fol. 132.

[7. In a *quare impedit* after the defendant has made title, yet the plaintiff may be nonsuited. (But it seems the nonsuit is a bar; for the other shall have writ to the bishop) 14 H. 4. 16.]

[8. At common law, upon every continuance or day given over before judgment the plaintiff might be nonsuited. Co. Litt. 139. b.]

[9. And

[9. And therefore before the statute of 2 H. 4. after verdict; if the Court had given day to be advised, at this day the plaintiff was demandable, and therefore might be nonsuited. But this is now remedied by the statute. Co. Litt. 139. b.]

See (D) pl.
12. in the
Notes there.

[10. But after demurrer in law joined, if the Court gives a day over, at this day the plaintiff may be nonsuited, for he is demandable; for it is not aided by any statute. Co. Litt. 139. b. Hobart's Reports, 111.]

(F) What shall be said a Nonfuit.

[1.] If a man brings writ of error upon a judgment against him, and for non speedy prosecution the recoverer sues scire facias against him to have execution, and because the plaintiff *exactus fuit & non comparuit*, execution is awarded. This is not any nonsuit of the writ of error, because he non fuit *exactus* upon the writ of error, but upon the scire facias. 9. H. 6. 13. b.

2. If a man be outlawed, and sues charter of pardon and scire facias against the plaintiff, who does not come, he shall be nonsuited 9 H. 6. 14.]

It seems in
nature of a
nonsuit, and
not a bar.
Br. Nonsuit,
pl. 9. cites
S. C.

[3. In debt the plaintiff counted, and the defendant was ready to wage his law, by which the plaintiff held his peace, and no justice heard the count, nor recorded it; wherefore the Court demanded of the plaintiff's counsel if they would count by which it was awarded, that the plaintiff take nothing by his writ, but be in misericordia, and therefore it seems it is only a nonsuit, and no bar. Br. Count, pl. 33. cites 2 H. 4. 15.

Br. Peremp-
tory, pl. 47.
cites S. C.

4. It was said, that where a man traverses an office and after waives the traverse, that then this is not peremptory, and this waiving, as it seems, is a nonsuit. Quære. Br. Peremptory, pl. 46. cites 4 E. 4. 24.

Nonfuit is
when a man
brings a per-
sonal action
and doth not
prosecute it
with effect,
or else upon

5. Nonsuit is, when the jury is ready to appear, or to give up their verdict; or, when upon a demurrer a day is given, and at that time the plaintiff or demandant being called does wilfully make default, and renounce his suit after appearance. Reg. Plac. 64. cap. 2. cites 8 Co, 58. 10 Co. 135.

the trial refuses to stand a verdict; then he becomes nonsuited, which is recorded by the Court, and the defendant recovers his costs against him. 2 L. P. R. 230.

A nonsuit is, when the plaintiff is demanded and does not appear; but when he comes into Court, and says, that non vult ulterius prosequi, that is a *retraxit*. 2 Le. 177. Sands v. Brocas.

Nonfuit is a renunciation of the suit by the plaintiff or demandant, when the matter is so far proceeded in, as the jury is ready at the bar to deliver their verdict. Reg. Plac. 96. cap. 2.—And tho' after nonsuit, the supposal in the Court shall not conclude; yet the bar, title, replication, or other pleading of either party, which precisely alleged, shall conclude after nonsuit. Reg. Plac. 114. cap. 3.

(F 2.) The

(F. 2) The *Difference* between a Nonfuit, Retraxit, Nolle Prosequi, Non-prof. and Departure; and the *Nature and Effect* thereof.

1. **T**H E tenant in assise pleaded a retraxit by the plaintiff in another assise against him of the same land; and the tenant had day to bring in the record, and fail'd at the day, upon which the plaintiff released his damages and recovered the land. And so see that * *retraxit* is a bar. Br. Departure, pl. 13. cites 15 E. 3. and Fitz. Aff. 96.

* S. P. Contra of a nonfuit. Br. Barre, pl. 93. cites 15 E. 3. — Br. Departure, pl. 12.

cites 21 E. 4. 43.

2. In an original writ, if the plaint be withdrawn, and a retraxit entered, and *after the parties accord in Court in nature of a fine*, and the Court accept it 'tis error; for the *originalis* is determined and the parties have not a day in Court. Co. R. on Fines 10. cites 37 Aff. P. 17. Br. Fines 82.

3. The *first record is gone by the nonsuit*, quod nota. Br. Examination, pl. 11. cites 35 H. 6. 5.

4. The difference between a *nonsuit* and a *retraxit* on the part of the demandant or plaintiff is thus: A *nonsuit* is ever upon a demand made when the demandant or plaintiff appear, and he makes default; a *retraxit* is ever when the demandant or plaintiff is present * in Court (as regularly he is ever by indentment of law until a day be given over, unless it be when a verdict is to be given, for then he is demandable) and this is in two sorts, one privative and the other positive. *Privative* is upon demand that he made default and departed in despite of the Court. † *Positive*, as when the entry is *et super hoc idem querens dicit quod ipse non vult ulterius placitum suum prædictum prosequi, sed ab inde omnino se retraxit &c. ideo &c.* A ‡ *departure in despite* of the Court is on the part of the tenant, and is when the tenant or defendant after appearance, and being present in Court, upon demand makes departure in despite of the Court; it is called a retraxit, because that word is the effectual word used in the entry, [which see at N] and it is ever on the part of the || demandant or plaintiff. Co. Litt. 138. b. 132 a.

See (N) — 2 L. P. R. 231. — * S. P. 8 Rep. 58. a. Mich. 6 Jac. in Beecher's case. — † As if a plaintiff comes in and says, he will not sue farther it is a retraxit; and when he will not appear, it is a nonsuit. Per all the Justices. Hard. 133, 154. Patch. 1659. in case of Turner v. Gallilee. — ‡ S. P.

8 Rep. 59. a. — || S. P. 8 Rep. 59. a. in Beecher's Case.

5. Another difference between a *retraxit* and a *nonsuit* is, that a retraxit is a bar of all other actions of like or inferior nature. Qui semel actionem renunciavit, amplius repetere non potest. But regularly a nonsuit is not so, but that he may commence an action of like nature &c. again. For it may be that he hath mistaken somewhat in that action, or was not provided of his proofs, or had mistaken the day or the like. Co. Litt. 139. a.

2 L. P. R. 231. — A retraxit is a stronger case than the case of a nonsuit, which is only a default or non appearance; but a retraxit is a

voluntary acknowledgement, that he has no cause of action, and therefore that he will not sue farther, and so this cause it is a bar for ever. 8 Rep. 59. a. Mich. 6. Jac. Beecher's Case.

6. *Nolle*

In an information it was insisted, that the entering a nolle prosequi was a bar to the

6. *Nolle prosequi* is, that the plaintiff *will proceed no farther in his action*, and may be as well before as after a verdict, and is stronger against the plaintiff than a nonsuit; for a nonsuit is a default for non-appearance; but this is a *voluntary acknowledgement that he hath no cause of action*. 2 L. P. R. 218.

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offence contained in the information, or at least, that it was the discharge from any farther prosecution for it; but per Cur. it is *neither a bar or discharge*. 10 Mod. 153. Patch. 12 Ann. B. R. the Queen v. Ridpath.

7. The entry of a retraxit does not discharge the defendant against whom it is entered from being party to the issue; till there is judgment given *quod eat inde sine die*. Arg. 12 Mod. 652. in case of Gree v. Rolle.

8. A retraxit is no more than an agreement on record, that he will not prosecute against that party; and a retraxit is not a confession of the want of cause of action. Arg. 12 Mod. 653. agreed per Holt Ch. J. 12 Mod. 655. in case of Gree v. Rolle.

See (H) pl. 2. 5.

(G) *In what Cases the Nonsuit of one shall be of others also. For what Thing, [or in what Actions.]*

S. P. Br. Su. per se deas, pl. 6. cites

[1.] *In personal actions* the nonsuit of one plaintiff shall be nonsuit of all. 18 H. 6. 28. Co. Litt. 139.]

1 H. 4. 4.—S. P. unless it be in certain particular cases. Co. Litt. 139. 2.—If *attaint upon personal action* be brought by two, the nonsuit of one is the nonsuit of both. Br. Nonsuit, pl. 69. cites 35 H. 6. 19.

Debt against two, the one was at the distress and the other at the exigent, and he at the distress came and demanded the plaintiff, and he was nonsuited, by which the other had superseas absolutely. Br. Nonsuit, pl. 8. cites 2 H. 4. 4.

So in attaint upon real or mixt actions. Br. Nonsuit, pl. 69. cites 35 H. 6. 19.

[2 [But] in *real and mix'd actions*, regularly, the nonsuit of one of the plaintiffs is not the nonsuit of the other; but he who makes default shall be *summoned and severed*. Co. Litt. 139. [a. (g)]

[3. In *scire facias* for damages recovered by two upon recovery by them of the land and damages, the nonsuit of one shall not be for both. For the damages are for the issues of the land, and are of the nature of the land. 47 E. 3. 6. b. 47 Aff. 3.]

See pl 10.

[4. So in writ of *Champerty* for maintenance in a real action, the nonsuit of one of the plaintiffs shall not be for both, because it ensues the nature of the first action. 47 E. 3. 6. b. 47 Aff. 3.]

[5. If two lose in a *formedon* upon a false return of summons, and they bring writ of *disceit*, and after the one is nonsuited in

in it, this shall not be the nonsuit of the other, because this ensues the nature of the first writ. 18 H. 6. 29.]

[6. If two bring writ of right in ancient demesne, and after join in recordare returnable in bank, and the one is nonsuited, this shall not be the nonsuit of both, because it ensues the nature of the first writ. 18 H. 6. 28.]

[7. In *formedon* brought by two, they sue a writ of *estrepement* against the tenant, and after one demandant makes default in the estrepement, by which he is nonsuited; this shall not be the nonsuit of the other also; for it is of the nature of the *formedon*. Contra 18 H. 6. 28. b.]

[8. If two bring action of debt upon obligation, the nonsuit of one shall be of both. 10 H. 6. 2. b.]

[9. In *scire facias* by two upon recognizance, the nonsuit of one shall be of both, because it is but chattel. 47 E. 3. 6. b. 47 Aff. 3.]

[10. So in writ of *Champerty* for maintaining the quarrel in *scire facias* against one recognizee, and who had the land demanded, the nonsuit of one plaintiff is of both, because this action is in nature of the first, being but accessory. 47 E. 3. 6. b. 47 Aff. 3.]

and that it seems there, that it would be otherwise if founded upon action real; but Brook says it seems all one; for the action is personal, and nothing shall be recovered but damages.

Fol. 133.

Because it is founded upon action personal. Br. Nonsuit, pl. 7. cites S. C.

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[11. In writ of ward of the body the nonsuit of one plaintiff shall not be the nonsuit of the other. 49 E. 3. 27. 30 E. 3. 30.]

[12. In writ of forgery of false deeds, the nonsuit of one plaintiff shall be of both. 18 H. 6. b.]

[13. In writ of right of ward brought by baron and feme, the nonsuit of the feme shall be of the baron also. 21 E. 3. 11. adjudged.]

[14. In assise by baron and feme the nonsuit of the feme by procurement of the defendant himself shall not be the nonsuit of the baron; for there is no reason that the feme shall * act contrary to the baron. 39 Aff. pl. 1. adjudged.]

But in ward by baron and feme, who sued by attorney, and after the feme was nonsuited, this was awarded the nonsuit of the baron and feme; quod nota bene. Br. Nonsuit, pl. 18. cites 21 E. 3. 12. — Orig. (Contraria.)

nonsuited, this was awarded the nonsuit of the baron and feme; quod nota bene. Br. Nonsuit, pl. 18. cites 21 E. 3. 12. — Orig. (Contraria.)

[15. In personal actions brought by executors the nonsuit of the one shall not be of the other, but there shall be summons and severance; because the best shall be taken for the benefit of the deceased. Co. Litt. 139.]

[16. In a trespass brought by executors as executors for goods taken out of their own possession the nonsuit of the one shall not be of the other. Co. Litt. 139.]

[17. In an account brought by executors as executors upon receipt by their own hands the nonsuit of one shall not be of the other. Co. Litt. 139.]

[18. In

6 Rep. 25. b.
—10 Rep.
135:

[18. In an *audita querela* concerning the personality the nonsuit of the one is not the nonsuit of the other; because it goes by way of discharge and enlargement of themselves, and therefore the default of the one shall not hurt the other. Co. Litt. 139.]

[19. In a *quid juris clamat* the nonsuit of one is the nonsuit of both; because the tenant cannot attorn according to the grant. Co. Litt. 139.]

20. 11 H. 7. cap. 21. S. 23. *Where there are one or more plaintiffs if any die, or be nonsuit, and albeit all the tenants or defendants and some of the petty jury die, yet shall not the attainr abate, so that two of that jury remain alive.*

21. If two be plaintiffs in a *nativo habendo*, and one be nonsuited this is the nonsuit of both: Co. Litt. 139. 2.

22. But in a *libertate probanda* the nonsuit of one is not the nonsuit of both. Co. Litt. 139. 2.

But the Reporter says, note, I have heard of another reason of the reversal of this judgment, viz. because there was not any judgment entered against C. for his non-pleading, nor day given, and so a discontinuance of the suit; and the nolle prosequi against him

23. *Trespass by A. against B. and C. and at the day of imperlance C. did not appear, whereupon a nihil dicit was entred against him. B. pleaded in bar; and thereupon A. replied. Demurrer was joined upon the replication and day given over to the next term; and then adjudged for the plaintiff, and at the same term a nolle prosequi was entred against C. and a writ of inquiry of damages awarded against B. and upon return thereof adjudged against him; and thereupon they brought error, and the error assigned was, because this nolle prosequi is against one, where judgment is entred against both, because a retraxit against the one is as strong as a release to the one, the which, being to one of the defendants, is a good discharge for both, and then this judgment against B. is erroneous; and of that opinion were all the justices and barons; wherefore it was reversed. Cro. E. 762. Pasch. 42 Eliz. in Cam. Scacc. Green v. Charnock, &c.*

came too late; and the discontinuance against one was a discontinuance against both, and of the entire suit, therefore &c. Ibid.

[572] (H) In what Cases the Nonsuit of the Plaintiff against one shall be for others. In what Actions.

Noy. 139.
Sir Richard
Vernon's
Case. S. P.

[1] *N debt against divers, if the plaintiff be nonsuited against one, he is nonsuited against both. 2 H. 4. 4. b.]*

—In debt upon obligation against three co-heirs, two confessed assets, and the third confessed a *liber* parcel; the plaintiff replies that the third has more lands; and issue thereupon; and at nisi prius the plaintiff was nonsuited; and therefore it was now moved to have judgment against the first two for so much as they have confessed; and the third who had nonsuited the plaintiff offered to consent for judgment to be given against him also for the first parcel; but per Cur. this cannot be; because a nonsuit as to the third is a nonsuit to all, and the consent of the third cannot bind the first two, nor himself as a new original; but the plaintiff ought to have had his judgment entred against the two at first; and by this default the plaintiff lost his debt, because there was an alienation after, and so a new original would come too late; and adjudged for the defendant. Sid. 378. Mich. 20. Car. 2. B. R. Blake's Case.

[2. *Tres*

[2. *Three obligors and obligee deliver the obligation into an indifferent hand upon condition; if the obligors bring detinue against bailee for the obligation, the nonsuit of one shall be the nonsuit of the other.* 2 H. 4. 16.]

[3. In an appeal against two, if the defendants join several issues, and after the plaintiff is nonsuited against one, this is a nonsuit against both. H. 37, 38 El. B. R. adjudged between Curtis and Brown.]

But it was held that the others who were not try'd should be arraigned

upon the declaration at the Queen's suit. Cro. E. 460. Curtis v. Savil and three others.

[4. In a writ against three by several præcipes, if the demandant be nonsuited against one, this shall be a nonsuit against all. * 21 E. 3. 36. b. 7 H. 6. 27. 27 E. 3. 87. b. Co. Litt. 139. in a † real action.]

Noy. 139. Vernon's Case, S. P.—
* Br. Nonsuit, pl. 57. cites S. C.

—S. P. For they find pledges de prosequendo but once only, and the other tenants shall have advantage of it; because the writ is intire as to the demandant, and several as to the tenants; per Ardern J. & non Negatur. Br. Nonsuit, pl. 45. cites 4 E. 33.—† S. P. For as to the demandant it is but one writ under one teste; note. Co. Litt. 139. a. b.—Præcipe of debt against two by several præcipes, Scilicet, præcipe [the one] quod reddat 20l. and præcipe the other quod reddat 10l. the plaintiff is nonsuited against the one, this is a nonsuit against both. Br. Nonsuit, pl. 19. cites 7 H. 6. 27.

[5. In a writ of quo jure communiam clamat &c. brought by two, the nonsuit of one shall not be the nonsuit of the other. 11 H. 3. Rot. 3. in dorso. between the prior of Okeburn and Richard de Turry plaintiff against Robert Clonnore adjudged.]

Fol. 134.

[6. In a personal action against two, if they plead severally, and after the plaintiff is nonsuited against one before he has judgment against the other, he shall be barred against both; for this operates in nature of a release of all. Hobart's Reports 243. between * Eveley and Sloley (Quere if this be not misprinted.)]

If a trespass be brought against two, & non prosequitur against one that is a retraxit, and may stand

against the other. Noy. 139. Sir Richard Vernon's Case.—* Hob. 180. S. C.

7. Writ of entry against two by several præcipes, and the one was at one issue, and the other at another issue of jointenancy, and the inquest found for the demandant in the first issue, by which he had judgment to recover, and after they were demanded upon the last issue, and the demandant would have been nonsuited; but per Markham he cannot; for by nonsuit against one all the writ shall abate; and Newton said that he cannot as it is here; for judgment is given against the one, therefore no nonsuit can be against him; quod fuit concessum. Br. Nonsuit, pl. 27. cites 22 H. 6. 42.

But to avoid the mischief the demandant confessed the nontenure of the other; for it was all at one day, as it seems, and therefore he cannot be nonsuited and recover upon one and the

same original, and the time shall be tried. But by the Reporter, this matter may be aided by the entry of the postea, and this shall make a diversity of time, and then, if the nonsuit comes after the judgment, and not in one instant, it is well. Ibid.

8. A. and B. were bound in a bond jointly and severally, and the obligee brought action against A. who pleaded that the

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It was argued that this was a bar only by plaintiff

way of estoppel between that obligor and the obligee of which no other could take advantage, and that it is not a release in fact, but only quasi a release, and that this

plea is no bar for A. And Croke J. inclined to this opinion, that it is neither a release in fact, or in law, but *quasi an agreement that he will no further prosecute*; and said, that it might be, that B. paid the moiety of the said debt, and that the plaintiff agreed to accept it of him, and would not further proceed against him; and that being jointly and severally bound he might make such agreement and not discharge the bond; but Berkely J. held the plea good, and a good bar, because the bond is joint and several, and one of them being discharged, it cannot now be a joint bond: and therefore a discharge quoad the one is a discharge also quoad the other. But no other justices being in Court it was adjourned. Cro. C. 551. Trint. 15 Car. Dennis v. Payne.—Mar. 95. pl. 165. S. C. but reports that the obligee brought debt on the bond against both. [which perhaps he meant (as in fact it was) at different times, and by several actions.]

Hob. 70. S. C. —Roll R. 233. S. C.— In trespass against two, who plead several pleas, and at the trial both are found for the plaintiff, and several damages; the plaintiff may enter a nolle prosequi against one, and proceed against the other; and so upon a demurrer, or issue and demurrer. Reg. Plac. 190. cap. 5. c. 2. Len. 177. Mo. 624. 1 Cro. 239. 243. 2 Cro. 118, 349. And Hob. 70.

9. In trespass against three defendants, one pleads to issue, and the other two demur; plaintiff has verdict on the issue and judgment, and as to the other two nolle prosequi is entered, yet plaintiff shall have his execution against the first; if nolle prosequi had been entered before judgment against any of them, this had not amounted to a release to all, but a waiver of suit. Jenk. 309. pl. 87.

But he said he did not take that to be law, or that the writ should abate by a non-prof. against one, or that

10. In ejectment against two, one confessed the action and the other pleaded not guilty; it was held that he could not enter a non-pros. against one of them, and have judgment against the other; and a difference was taken between trespass and ejectment; cited by Holt Ch. J. 12 Mod. 656. in the case of Gree v. Roll, as a case in the year 1650.

* Ejectment against several, who all entered into the rule of lease, entry, and ouster; at the assize some would confess and others would not; the plaintiff, as to those that would not confess, entered a non-pros. and went on against the others, and recovered; upon this a rule was made, that in like cases the plaintiff should go on against those who would confess, and as to those who would not, should be nonsuit; but that the cause of the nonsuit should be expressed in the record, viz. because those defendants would not confess lease, entry and ouster; and upon the return of the posses, the Court would be informed what lands were in the possession of those defendants, that the judgment might be entered against the casual ejector as to them. 2 Salk. 456, 457. Palch. 4 Ann. B. R. Greaves v. Rolls.

11. In a joint action against two the jury sever'd the damages, 50*l.* against one, and 1000*l.* against the other; plaintiff enters non-pros. to the 50*l.* The entering the nolle prosequi as to one defendant is no discharge of the other; and plaintiff had judgment. 2 Show. 469. Pasch. 1 Jac. 2. B. R. Radrey v. Strode.

Jenk. 309. pl. 87.—3 Mod. 101. S. C.—And this entering the nolle prosequi as to the other defendant

cured the fault in the verdict. Carth. 19. S. C. and affirmed in Parliament. Ibid. 21.

12. Where there are *divers issues joined* between the plaintiff and defendant, and the plaintiff enters upon the roll a nolle prosequi, id est, non vult ulterius prosequi, that he *will not proceed upon one*, or more of the issues joined, yet *he may proceed to trial upon the rest of the issues*. Reg. Plac. 190. cap. 5. cites Prac. Reg. 206.

L. P. R. Nolle prosequi.

(I) At what Time.

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[1.] *IN debt against divers, if one be at the exigent*, and the plaintiff is nonsuited against the other, this shall serve for him who is at the exigent also. 2 H. 4. 4. b.

See (D)—(H.) pl. 6.

(K) In what Cases the Nonfuit in one Thing shall be in another Thing.

[1.] *IN debt if the defendant acknowledges the action for part, and pleads to issue for the residue, and the plaintiff has judgment immediately because it is confessed, but cesset executio by reason of the damages which are to be assessed by the jury upon the issue tried, if the plaintiff be nonsuit in this issue, this shall not be nonsuit for the damages to be given; because he has judgment.* 18 H. 6. 26. Contra 42 E. 3. 25. b. Adjudged.]

Because he had judgment which was confessed before the nonsuit. But if the nonsuit had been before any judgment,

then the nonsuit had gone to the whole action, so that he should not have judgment for any part; but contra of nonsuit after judgment for part. Br. judgment, pl. 150. cites 42 E. 3. 25.—Brooke says the reason appears there plainly to be, because upon the confession the plaintiff had judgment immediately of the principal debt; for if judgment had not been demanded of this parcel before nonsuit, the plaintiff could not have recovered for any part. Br. Nonsuit, pl. 64. cites S. C.

[2. In writ of account, if the defendant be adjudged to account, and then the plaintiff sues a *capias ad computandum*, in which he is nonsuited, it shall not be any nonsuit of the first original; for this was determined by the judgment to account 21 E. 3. 7. Adjudged. 3 H. 4. 7.]

If the defendant be adjudged to account, and be at issue before the auditors, and the inquest

is ready to pass, and the plaintiff is present and will not sue, he shall be barred in the principal action; for by the award of account the action is not determined; for the action depends upon the original, and so the nonsuit or discontinuance of account is a discontinuance of all the action, and not like to other actions where the plaintiff has judgment to recover; for there the action is clearly determined; and when he brings scire facias upon it, he may be nonsuited in it; and yet the first recovery is good; but it is otherwise here. Br. Nonsuit, pl. 41. cites 1 H. 7. 2.

[3. In action of *debt*, if defendant *to part pleads to the country, and to the residue wages his law*, (as he may) and after defendant comes to make his law, if the plaintiff be nonsuited upon the ley wager, this shall be a nonsuit for the whole. P. 16 Ja. B. R.]

• Where there is but one defendant and he pleads to issue as to part, and demurs to the other part, the plaintiff may be nonsuit as to one point, and proceed for the other. Hob. 180. Trin. 1: Jac. Sloley v. Eveley.

[4. In a *prohibition*, if the plaintiff declares, that where the suit in the Spiritual Court is for *tithes of four mills*, that A. was seised of a house and *two ancient mills* in the same house, and that he and all those whose estate &c. have paid 10s. *in lieu of all tithes issuing out of the house and two ancient mills*, and that after he *built in the same house two new mills*, and so by the law he is to be discharged of tithes of those two new mills; A. the defendant, as to the custom, takes issue no such custom as to the house and two ancient mills, and as to the two new mills he demurs in law; and after at the nisi prius to try the custom the plaintiff is nonsuited, this is a * nonsuit also as to the demurrer; for it is *but one original*. Mich. 13 Car. B. R. between Goodwin and Smith. Adjudged per Curiam, and a consultation granted accordingly. Hobart's Reports, 243. Eveley v. Sloley.]

[575] 5. If A. B. has *diverse actions* or assises and nisi prius against D. C. there D. C. may *appear in person to one suit, and be nonsuited as to the other*, and all at one and the same day. Quod Nota. Br. Nonsuit, pl. 22. cites 21 H. 6. 20.

6. In trespass, where *several pleas are pleaded*, and the one is at issue, and to the other the plaintiff replies, and his replication is ill, and the defendant demurs, and the replication is determined to be insufficient, per tot. Cur. there is no remedy, but the plaintiff to be nonsuited in all or barred of this parcel; quod nota; that a man shall be nonsuited as well upon a demurrer before judgment, as upon an issue before verdict. Br. Nonsuit, pl. 31. cites 14 H. 8. 23, 24.

Lev. 263. S. C. and Raym. 175 S. C. but neither of those books mention the entry of the nolle prosequi.

In a declaration there were four counts; the defendant demurred to one of them, and the plaintiff had judgment on the demurrer, and then entered a nolle prosequi as to

7. In debt for rent the plaintiff counted of a demise of three chambers and a cellar at 9l. rent, and for rent arrear brought the action. The defendant pleaded as to part nil debet, and to the residue, that the demise was of three chambers, a cellar, and another room. The plaintiff as to the plea of nil debet entered a nolle prosequi, and as to the said special plea he demurred in law. Saund. 206. Hill. 20 & 21 Car. 2. Salmon v. Smith.

8. In assumpsit the plaintiff declared of two several promises; the defendant pleaded, and thereupon the plaintiff demurred. The plaintiff entered a nolle prosequi upon the second promise, and had judgment upon the first; and the judgment was affirmed in error. 2 Lev. 33, 34. Hill 23 & 24 Car. 2. B. R. Woolnough & Ux v. Viridon.—But the Reporter adds a note, that no notice was taken that the nolle prosequi was entered upon one promise before the judgment upon the other, but says it seems to be good by the case of Walsh and Bishop. Cro. C.

the other three counts, but without misericordia; and this being assigned for error, the Court held, that if the entry of a misericordia had been necessary at common law, there is no statute of reversal which

which cures the want of such entry; for those statutes extend to judgments entered by confession, nil dicit, or non sum informatus; but the principal judgment is neither of these; for it is a judgment upon a demurrer joined. Now at common law there was no need of entering a misericordia in such cases, because such entry is only pro falso clamore, and here is no colour of any false complaint, because the plaintiff says non vult ulterius prosequi, so the judgment was affirmed. 8 Mod. 198. Mich. 10 Geo. Anon.

(L) *Where it shall be a Bar of other Actions, and peremptory.*

1. * *APPEAL* of felony, robbery, or larceny, may be taken before the coroner, and if the plaintiff be nonsuited after appearance, he shall lose his action for ever; and so the nonsuit is peremptory. Br. Nonsuit, pl. 59. cites 22 Aff. 97. Br. Peremptory, pl. 31. cites S. C.—S. P. Br. Nonsuit, pl. 51. cites 47.

H. 3. 16.—S. P. Br. Peremptory, pl. 8. cites 9 H. 4. 2.—S. P. So of appeal of murder and rape, and this in favorem vitæ; for if the defendant be acquitted, and take out process upon the statute of Westminster 2. against the abettors, or if he purchase his original writ, for that cause he may be nonsuit. Co. Litt. 139. a. (d)

If the plaintiff in * appeal of maihem be nonsuited after appearance, this is a good bar in trespass, per Knivet Ch. J. clearly; and so it * seems peremptory clearly. Br. Nonsuit, pl. 40. cites 43 Aff. 39.—Br. Trespass, pl. 261. cites S. C.—Br. Nonsuit, pl. 66. cites S. C.—Br. Peremptory, pl. 62. cites S. C.—S. P. per Knivet Justice, and he shall not have trespass or appeal thereof again. Br. Peremptory, pl. 37. cites S. C.—S. P. for the writ says, felonice maihemavit, and therefore the nonsuit is peremptory. Co. Litt. 139. a. (e)

In appeal by feme of the death of her husband, if the plaintiff is nonsuited in appeal after appearance, she shall not have another appeal; per Huls. Quod nemo negavit. Br. Nonsuit, pl. 11. cites 9 H. 4. 12.

2. In writ of error the plaintiff was nonsuited, and brought another writ of error, and was received to it, and they proceeded to the examination of errors, and reversed the first judgment, notwithstanding the allegation of the nonsuit in the first writ. Br. Nonsuit, pl. 38. cites 23 Aff. 8. Br. Error, pl. 121. cites S. C.—S. P. Ibid. pl. 140. cites 2 H. 7. 12. [576]

But if the party be in execution, he shall not have supersedeas. Per Cur.—Br. Nonsuit, pl. 42. cites S. C.—S. P. Ibid. pl. 47. cites 5 E. 4. 2.—S. P. Br. Peremptory, pl. 38. cites 2 H. 7. 12. & 19.

3. In audita querela the plaintiff shall have a supersedeas, but if he be nonsuited in the audita querela, yet he may have another writ of audita querela, but not a supersedeas. Br. Nonsuit, pl. 32. cites 24 E. 3. 7. & 22 E. 3. 4. S. P. per Jay Br. Nonsuit, pl. 42. cites 2 H. 7. 12. Quod Mor-dant Con-

cessit.—S. P. Br. Peremptory, pl. 38. cites 2 H. 7. 12. & 19.

If a man sues execution contrary to his own deed, and the other sues audita querela, and has supersedeas in Chancery, and after is nonsuited, and the other sues execution again, there in audita querela he shall not oust the plaintiff of execution; per Markham; and per Yelverton, this is because a man shall have but one supersedeas in Chancery. Br. Nonsuit, pl. 26. cites 21 H. 6. 34.—Br. Peremptory, pl. 18. cites S. C.

4. Nonsuit in per quæ servitia is not peremptory, but he shall have a new writ. Quod Nota. Br. Nonsuit, pl. 33, cites 24 E. 3. 45. Br. per quæ Servitia, pl. 6. cites 24 E. 3. 25.—S. P. per

Cur. And so in quid juris clamat; contrary in ancient time. Quod Nota bene. Br. Nonsuit, pl. 57. (bis) cites 24 E. 3. 45.

5. In *scire facias* upon recognizance the plaintiff was nonsuited, and brought another *scire facias* in the same bank, and well; quod nota; for there is the record; but contra where the tenor of the record only has been sent, and not the record itself. Br. Scire Facias, pl. 128. cites 24 E. 3. 73.

S. P. per Pole, and that all the

parties are by this * acquitted and discharged for ever. Quod non negatur. Br. Peremptory, pl. 29. cites 19 Aff. 13. & 32 Aff. 13. acc.—* Orig. (Affouths)

The reason why the nonsuit in attain is peremptory is, for the faith that the law gives to the verdict, and for the terrible and fearful judgment that should be given against the first jury if they should be convicted. Co. Litt. 139. a. (f)

7. *Contra* upon *discontinuance*; for upon this there is no judgment given, as upon nonsuit; note the diversity. Br. Nonsuit, pl. 39. cites 32 Aff. 13.—and 19 Aff. 13. accordingly.

Br. Nonsuit, pl. 12. cites 11 H. 4. 52. S. C.—A man may be nonsuited in

8. *Petition of right* was traversed and the party nonsuited in the petition; and the opinion was, that he may have a new petition, notwithstanding the nonsuit. Br. Petition, pl. 10. cites 11 H. 4. 52. 67.

a petition and have a new petition. Br. Nonsuit, pl. 34. cites 4 H. 6. 12.—So in a traverse and have a new traverse. Br. Ibid.—S. P. Br. Traverse de Office, pl. 54. cites Frowike's Readings.

Nonsuit in petition after issue joined is peremptory. Br. Petition, pl. 22. cites 3 H. 7. 13.—Br. Peremptory, pl. 72. cites S. C.—8 P. per Townsend. Quere inde. Br. Nonsuit, pl. 43. cites S. C. and 22 E. 4. 9.

9. A. brings *debt* against B.—B. *imparls till the morrow*; B. appears; A. is demanded and does not appear; A. shall be nonsuit. If the *imparlance* had been *general*, and not at a day certain, and the defendant had appeared, and the plaintiff being demanded had made default, A. in this case should be barred; for this is a departure in despite of the Court, and a retraxit, as is used in a common recovery, upon the voucher of the tenant, the vouchee appears and imparls to no certain day, and being demanded makes default, judgment is hereupon given against the tenant, and for the tenant against the vouchee to recover in value. Where the *imparlance* is general, both parties ought always to attend the Court, and are demandable at the pleasure of the Court: it is otherwise where the *imparlance* is to a certain day, for in this case the parties are not demandable till the day. Jenk. 80, 81. pl. 58. cites 9 H. 5. 5.

Br. Nonsuit, pl. 56. cites S. C. accordingly. Brook says, quere, [577] if this nonsuit shall be referred to the *scire facias* or to the writ of error.

10. A man brought *writ of error and scire facias* upon it, and after is nonsuited, and then brings another *writ of error and another scire facias* thereupon, and the plaintiff in the first action who recovered prayed execution, and the plaintiff in the writ of error prayed *superfedeas* till the error was discussed, and had it by award, because he had no *superfedeas* in the first writ of error; and yet by Hongate Chief Clerk, the first writ of error is *superfedeas* in itself, and it is said that it is so where the writ of error abates, inasmuch as the plaintiff is made

made a bishop or knight, he shall have another supersedeas. Br. Error, pl. 55. cites 9 H. 5. 13.

If error is
sued with a
scire facias,
and the

plaintiff is nonsuited, there he may have another writ of error and scire facias. Br. Nonsuit, pl. 63. cites 6 H. 7. 16.

11. Nonsuit after appearance is peremptory, and *e contra* before appearance. Br. Faux Judgment, pl. 9. cites 21 H. 6. 34. and says it seems so by that case,

Br. Peremp-
tory, pl. 18.
cites S. C.—
Brook says,
it seems that

no nonsuit is peremptory but nonsuit after appearance. Br. Nonsuit, pl. 66.—In *quare impedit*, nonsuit after appearance is peremptory. 2 Salk. 559. Mich. 3 W. & M. B. R. Berkley v. Hansard.—S. P. If the plaintiff in *quare impedit* be nonsuited after appearance, the defendant shall make title, and shall have writ to the bishop, though it be before any count. Br. Nonsuit, pl. 62. cites 19 E. 4. 9. & 33 H. 6. 1.—

It is a general rule that nonsuit before appearance is not peremptory in any case; because a stranger may purchase a writ in the name of him that hath cause of action. Co. Litt. 139. a. (f).—Nonsuit before appearance is no bar in another action. Carth. 173. Cloberry v. Bishop of Exon.

12. It was said by some of the Court for law, that if a man be adjudged to account and is at issue before the auditors, and the inquest is ready to pass, and the plaintiff makes default, he shall be nonsuited, and the action shall not be revived after. Br. Nonsuit, pl. 41. cites 1 H. 7. 2.

13. If a man be adjudged to account who is not present, a *capias ad computandum* shall issue, and upon this returned, if the defendant appears, and the plaintiff makes default, he shall be nonsuited, and yet another time he shall have *scire facias ad computandum*; per Townsend, which was not deny'd; and this *scire facias* gives day to the parties, upon which they shall plead to the action. Br. Nonsuit, pl. 41. cites 1 H. 7. 2.

Contra it is
upon *capias*
ad satisfaci-
endum; for
they have no
day upon
this. Br. *ibid*

14. Where a statute gives action as maintenance, *decies tantum &c.* which were not at common law before, it seems that the party may be nonsuited, and have a new action, and traverse is in lieu of action. Br. Traverse de Office, pl. 16.

15. In writ *de nativo habendo* nonsuit after appearance is peremptory; for thereby the villein is enfranchised. Co. Litt. 139. a. (c)

16. But in a *libertate probanda* nonsuit after appearance is not peremptory. Co. Litt. 139. a. (c)

17. Nonsuit in a writ of right where the issue is joined upon the meer right is peremptory. Otherwise if the issue had been joined upon any collateral point. Goldsb. 90. Trin. 30 Eliz. Heydon v. Ibgrave.

But if the
nonsuit be
before ap-
pearance, in
such case
judgment fi-

nal shall not be given; but contra after appearance. Br. Nonsuit, pl. 26. cites 21 H. 6. 34.—*quod ei de forceat* in nature of a writ of right was brought, in which the wife was joined upon the mere right, and after the jury was charged, the demandant upon nonsuit was barr'd by judgment, and a new *quod ei de forceat* was brought, and the first judgment pleaded in bar, upon which there was a demurrer, and adjudged a good bar, and judgment final given; whereupon error was assigned, that judgment final ought not to have been given upon this demurrer; and after argument, the opinion of the Court upon conference with several of the justices of England was, that the judgment ought to be affirmed. Mo. 403. pl. 536. Paich. 37. Eliz. Aprichard v. Penry.

18. After nonsuit *no motion* can be made *in arrest of judgment*; for the plaintiff is out of Court; per Cur. And tho' the case was *in replevin* where the avowant is actor, yet it cannot be made. Litt. R. 253. 5 Car. C. B. Lucas v. Heath.

19. When a plaintiff is nonsuit, if he will again proceed in the same cause, he must put in a new declaration, and *cannot proceed upon that declaration* whereupon he did proceed in the cause and *wherein he became nonsuit*: 22 Car. B. R. 16 April 1650. For by his being nonsuit, it shall be intended that he had no such cause of suit as he declared in; and so that declaration is void; and he hath no day in Court. 2 L. P. R. 231.

[578]

20. The *declaration on the nisi prius roll varied from the plea roll*, and plaintiff at nisi prius was nonsuit. Distringas de novo was awarded, and the nonsuit not material. Raym. 38. Mich. 13 Car. 2. B. R. Read v. Grapler.

(M) Of calling for the Plaintiff.

* Orig.
(homeque).

1. **NOTE**, tho' **the plaintiff appears when the inquest appears*, yet when they are sworn upon the issue and are together, and after come back to give their verdict, he shall be then demanded, and *may be nonsuited* notwithstanding his appearance before, and so it is used at this day. Br. Nonsuit, pl. 65. cites ‡ 50 E. 3. 12.

‡ Quere if
this be not

misprinted, tho' all the editions cite as here.

2. *Plaint was removed out of C. B. by pone by the defendants*, and at the day of return the plaintiff did not come, by which the plaintiff was demanded thus, [viz.] *J. F. thou lovest thy writ*. Br. Nonsuit, pl. 28. cites 21 H. 6. 50.

3. *If a replevin be by writ or plaint*, yet the form to demand the plaintiff to nonsuit him is, *J. F. thou lovest thy writ*, and not, *thou lovest thy plaint*; and the plaintiff did not come, because nonsuit was awarded, and that the defendant may sue return. Br. Nonsuit, pl. 28. cites 21 H. 6. 50. per Brown.

The Court
calls not the
plaintiff for
a nonsuit
until the ju-
ry are about
to give their
verdict, nor
then neither
but only for
his advan-
tage; for
th^e judges of
nisi prius have

4. In debt upon bond they are at issue, and at another day the defendant confessed the deed when the inquest appeared, by which they were charged upon the damages only, and after they come back to give verdict of damages, the plaintiff there shall not be demanded nor nonsuited; for the judgment shall be now upon the confession, and not upon the verdict; for they were not charged upon the issue, but only of damages, as an inquest to inquire of damages, and not an inquest upon issue; Nota. Br. Nonsuit, pl. 61. cites 16 E. 4. 1.

nisi prius have authority to take the verdict without demanding the plaintiff; and there is no entry of his being demanded; nor is it error if he be not. Comb. 331. Trin. 7 W. 3. B. R. Read v. Waldron.

5. Upon a trial when the jury comes to deliver in their verdict, and the plaintiff is called to hear the verdict; *if he do*

26:

not appear after he is thrice called by the cryer of the Court, he is to be nonsuited, and the nonsuit is to be recorded by the secondary, by the direction of the Court, at the prayer of the defendant's counsel. Hill. 21 Car. B. R. For the Court will not order it to be recorded, except the counsel pray it for the client. 2 L. P. R. 231.

(N) Entry thereof; when, where, and how;
And Pleadings.

1. **T**HERE are divers manners of entries of a retraxit. After both parties have appeared in Court, the entry is, *Et postea eodem die revenit hic ad barram præd' tenens per attornatum suum prædictum, & præd' retens tunc solemniter exactus non venit, sed a secl'a sua præd' in contemptum Cur' se retraxit ideo consideratum est quod petens nihil capiat per breve suum præd' sed sit in misericordia pro falso clamore suo inde, & quod præd' tenens eat inde sine die.* 8 Rep. 62. a. Mich. 6 Jac. in Beecher's Case, says this appears Trin. 5 H. 6. Rot. 320.

2. Another form is, *Et super hoc idem querens dicit, quod ipse non vult ulterius placitum suum præd' prosegui, sed abinde omnino se retraxit &c. Ideo &c. Ibid.* [579]

3. Another form is, *Quod idem querens fatetur se (seu cognovit se) ulterius nolle prosegui versus præd' def. &c. de placito præd. Ibid.*

4. And entry of a departure in despite of the Court of the part of the tenant is, *Et præd' A. licet solemniter exactus non revenit, sed in contempt' Curia recessit & defaultam fecit;* and, this is when in judgment of law he is present in Court, and, being demanded, departs in despite of the Court: this amounts to a bar in respect of the despite and contempt to the Court. And yet the judgment is there given upon default as appears before. Ibid. & 62. b.

5. A man sued writ of error in B. R. and permitted the record to lie, and did nothing, by which the plaintiff brought scire facias of execution, and the defendant was twice returned nihil, by which it was entered that inasmuch as the defendant was demanded and did not appear, therefore fiat executio &c. and this entry was after upon the scire facias to have execution, and not to be a nonsuit in the writ of error, quod nota. Br. Nonsuit, pl. 2. cites 9 H. 6. 13. Br. Error, pl. 6. cites S. C.

6. Where the plaintiff is nonsuited after issue joined in second deliverance, there a special entry shall be made, and this by reason that the defendant shall have return irreplevisable. Br. Nonsuit, pl. 24. cites 22 H. 6. 22.

7. A retraxit cannot be by the plaintiff unless he comes in proper person, and if it be awarded by arbitrement that J. N. shall withdraw or retract such action, there a discontinuance or nonsuit will not serve, but he ought to make a retraxit, * The words in all the editions are (procedere non velit.)
per prose- qui non vult.

sed abinde omnino se retraxit and if he be present in Court and demanded, the entry is, a sec-

tra sua præd' in contemptum Curie se retraxit &c. or fatetur se ulterius nolle prosecute &c. and with this agrees 3 H. 6. 14. a. 21 Ed. 3. 43. a. & 4 E. 3. 23. a. Where the case was, that three coparceners were plaintiffs in writ of disceit, and two of them appeared in person, and the third by attorney, and said, that they would no further sue; and could not, because the one was by attorney; by which they were nonsuited. 8 Rep. 58. a. b. Mich. 6 Jac. in *Beccher's case*.—S. P. 12 Mod. 652. in case of *Greene v. Rolle*.

† Br. Departure, pl. 13. cites 15 E. 3. and Fitzh. Assise 96.

8. In case of nonsuit *after privy verdict* the verdict which was before given shall be entred *on the back of the pannel or in the schedule annexed*, and not in the roll &c. Kelw. 65, pl. 3 Trin. 20 H. 7.

9. In *trespafs* were several issues, one found for the plaintiff & super hoc idem quer' gratis hic in Cur. cognovit se ulterius nolle prosecute versus le defend. de cæteris exitibus, upon which there is an *eat inde sine die*, and the plaintiff has judgment for the other. 2 Salk. 456. Mich. 3 Ann. B. R. in case of *Goddard v. Smith*. cites Co. Ent. 650. d.

10. *Issue was for part, and demurrer for part* in an action of *trespafs*, and *verdict pro quer'* upon the issue; upon which the plaintiff enters a non pros. in this manner, Et super hoc idem quer' quoad materiam prædict. unde partes prædict. posuerunt se in iudicium fatetur se nolle materiam illam &c. ulterius quovismodo intromittere; ideo idem defendens *eat inde sine die* &c. & superinde idem querens petit iudicium de damnis prædict. &c. ideo consideratum est, that the plaintiff recover; and that the plaintiff be amerced pro falso clamore as to the rest, & quod defendens *eat inde sine die*. Ibid. cites Co. Ent. 676. &c.

11. Jury came in with their verdict, and the plaintiff was nonsuit, and the entry is, Super quo querens solemniter exactus non revenit nec est prosecutus billam suam, super quo consideratum est *quod nil capiat*. Ibid. cites Co. Ent. 28.

[580] 12. Error of a judgment in B. R. The error assigned was, whereas the plaintiff was nonsuited in *trespafs* after evidence; the judgment is, *quod nihil capit per billam*, which is a bar; whereas it ought to have been only in *misericordia quia non prosecutus est* &c. But it was held to be no error; for all the precedents of later times are in that manner. 2. For that the judgment is, *quod querens & plegii sui sint in misericordia pro falso clamore suo*, whereas it ought to have been, *quia non prosecuti sunt*; for it ought not to be pro falso clamore, but where it is after verdict or judgment upon demurrer; and for that see F. N. B. 76. a. Book of Entries, 176. And for this matter it was held to be manifest error, and the judgment was reversed. Cro. J. 213. Mich. 6 Jac. B. R. Anon.

13. In action upon the *case*, if the plaintiff be *nonfuit*, and after it is entered, that he *reliquit actionem suam & fatetur se nolle ulterius prosequi*, this is not any nonfuit as it is entered. See Error (A) pl. 5. cites Mich. 11. Jac. B. R. between Coles and Lowe. Adjudged.

14. Debt against A. B. and C. by three several *præcipes*, and is at issue upon *non est factum* with A, and when the jury returned to give their verdict, the plaintiff is nonsuited; and the entry was *non prosequitur de veredicto habendo*; per Cur. that is most barbarous; for it ought to have been *non prosequitur bre. suum*; and the nonsuit against one is the nonsuit against all. Noy. 139. Sir Richard Vernon's Case.

A *latitat* was sued out against four defendants in trespass; the plaintiff was nonsuit for want of a declaration, and the defendant's attorney entered four nonsuits against him; and it was held to be irregular, because the trespass is joint, and tho' the plaintiff may count severally against the defendants, yet it remains joint till it is severed by the Court. 2 Salk. 455. Trin. 12 W. 3. B. R. Allington v. Vavasor.

15. In ejectment to try the custom of East-brent in Somersetshire of copies for three lives the plaintiff was nonsuit, and one of the defendants being dead Hales Ch. J. advised to enter into suggestion on the roll that one was dead, else the judgment for the defendants on the nonsuit will be erroneous as to all; and the defendant did accordingly. 2 Keb. 832, 833. Mich. 23 Car. 2. B. R. Hawthorn v. Bawden.

16. A. brought action against the collector of the King's tax who brought it down to trial by *proviso* and there the plaintiff was nonsuit, and now defendant moved for *costs in triplo*; note the judge could not certify in this case that defendant was *sued as collector*, because the plaintiff was *nonsuit before evidence*; per Holt it must appear then by *affidavits*, and there must be a *special entry*, quia super exam. apparet Curiae &c. Cumb. 322. Sir P. Egerton's Case.

17. A man may be nonsuited in term-time, and the record made up in the vacation; but it must be entered on the roll of the preceding term; per Holt Ch. J. 12 Mod. 417. Musgrave v. Esfcourt.

18. In *ejectment* a retraxit was entered as to one *at nisi prius* and trial against the others, and held well. 12 Mod. 651. Gree v. Rolle.

19. It was agreed in the arguing of this cause, that where there are several defendants, and they sever in plea, whereupon issue is joined, that the plaintiff may enter a *non pros.* as to one defendant at any time before the record is sent down to be tried at nisi prius. 2 Salk. 457. Patch. 4 Ann. B. R. in case of Greeves v. Rolls.

20. Non pros. ought not to be entered upon an *indictment* but upon motion in Court and leave thereby obtained. Farr. 86. the Queen v. Parker

(O) Judg-

(O) Judgment.

[581] 1. ACTION upon the *case* upon a promise, *in consideration* that he promised to pay 10l. within six weeks, the defendant assumed to do such a thing, and for non-performance brought the action; and upon non assumpsit pleaded, the parties being at issue, the record of nisi prius was, in consideration that he promised to pay 10l. within six months. And for this variance, being against the truth, and the former record, the plaintiff was nonsuited, and upon advisement of two precedents, a *venire facias de novo* was awarded, and the issue being tried for the plaintiff, judgment was given for him. Cited Cro. J. 670. Trin. 21 Jac. in case of Young v. Englefield as Trin. 9 Jac. Farthing v. Dapper.

S. C. cited
Raym. 38.
Mich. 13.
Car. 2. B. R.
Read v.
Grapler.

• See pl. 1.

2. *Trespāss de clauso fracto* in parochia de Pancrafs abutting upon *Graves-Inn-Lane*. The defendant pleaded not guilty; and the record of the *nisi prius* was *Graves-Inn-Lane*, wherefore by reason of this misprision, because there was no such place, the plaintiff was nonsuited. But now in regard the paper book and the roll were good, viz. *Graves-Inn-Lane*, which was the true place, and it was but a misprision in the record of nisi prius, which was void being variant from the record here, a *venire facias* was prayed de novo to try this issue, and the case of *Farthing and Dapper being shewn in Court, and the roll thereof well weighed, the Court now held that it was a good precedent and stood upon good reason; for the record of nisi prius ought to be warranted by the roll, and varying from it is void, and the nonsuit upon it is not material; wherefore here they awarded a *venire facias de novo*. Cro. J. 669, 670. Trin. 21 Jac. B. R. Young v. Englefield.

S. C. cited
and the reason of this is, that the nisi prius roll being materially different from the plea roll, is no transcript; and therefore the nonsuit for not proving what was not in issue is a perfect nullity, and it ought not to be entered on the record. G. Hist. C. B. 138. cap. 15. cites Cro. Car. 204. Weeks's Case.

3. W. keeper of the gatehouse was sued in an action upon the case for suffering J. S. to escape, who was in execution upon a judgment Trin. 2 Car. He pleaded non culp. in London, and it was found by nisi prius; and because the record of the nisi prius mentions the judgment to be Trin. 3 Caroli, which was a misprision of the record, the plaintiff was nonsuited: And now it was moved for the plaintiff, That by reason of this misprision the record of nisi prius is not warranted by the roll, and the nonsuit thereupon being null, the postea shall not be recorded nor entered; for there is no warrant for this record of nisi prius; wherefore it was prayed, that a *distringas de novo* might be awarded, and upon the shewing of two precedents in this Court, a *distringas de novo* was awarded. Cro. C. 203. Mich. 6 Car. B. R. Aquila Weeks's Case.

S. P. and S. C. cited. But here the defendant insisted to have costs, and they directed to search precedents. And it seems he shall have costs at the discretion of the Court. Raym. 38. Mich. 13 Car. 2. B. R. Read v. Grapler.

In an action upon the case the plaintiff at the nisi prius was nonsuit, because the nisi prius roll is
that

that the plaintiff was in such a benefice in the year 1662, whereas the *plea roll* is 1626, and so the plaintiff is destitute of his proof; and now Wild Serjeant, moved to set aside the nonsuit according to Weeks's case. Cro. Car. 203. and it was adjourned Raym. 73. Pasch. 15 Car. 2. B. R. Fitch v. Vinor.

4. In *trespass and ejectment* the defendant was by rule of Court, at the trial which was to be at the bar, to appear and confess lease, entry, and ouster, and to stand upon the title only, yet at the trial he would not appear, upon which the plaintiff was nonsuit, and yet the judgment was for the plaintiff upon the rule; and he was ordered to pay the Jury. Nota. Sty. 425. Mich. 1654. B. R. Harvey v. Mountney.

In an ejectment where there are diverse defendants which are to confess lease, entry and ouster, if every one

do not appear at the trial, the plaintiff cannot proceed against the rest, but must be nonsuit. 1 Vent. 355. Trin. 33 Car. 2. B. R. Anon.—S. P. 2 Vent. 195. Trin. 2 W. & M. C. B. Fagg v. Roberts & al.

(P) Judgment. Costs. In what Cases. [582]

1. 3 H. 7. cap. 10. *WHERE* any person shall bring a writ of error to reverse a judgment before execution is had, if the judgment is affirmed or the writ discontinued, or the plaintiff in error is nonsuited, the defendant in error shall have his costs and damages.

This statute is confirmed by 19 H. 7. 10.

2. 7 H. 8. 4. S. 3. Every avowant that makes avowry or connusance, or justifies as bailiff in any replegiare or second deliverance for rent, custom, or service, if their avowry, connusance or justification be found for them, or the plaintiff be otherwise barred, shall recover damages and costs.

In second deliverance, the plaintiff was nonsuit, and damages were awarded to the defendant; for

now the defendant shall have return irrepleviable, which is in nature of a bar to the plaintiff; and this statute is, that if it be found &c. Br. Damages, pl. 1. cites 19 H. 8. 6, 7.—S. P. by Saunders, and that this is by the equity of the statute, the intent being to give damages in like cases. Pl. C. 32. b. in case of Partridge v. Strange.

3. 21 H. 8. 19. S. 3. Enacts that in replevin or second deliverance for rents, customs, services, or damage feasant, if the avowry &c. be found for the defendant, or the plaintiff be nonsuited, or otherwise barred, the defendant shall recover such damages and costs as the plaintiff should have had if he had recovered.

In replevin the defendant avowed for damage feasant, and the plaintiff and defendant are at issue. and

after the plaintiff is nonsuited; quere, if the avowant shall have his costs and damages by the statute of 7 H. 8. cap. 4. For this case is clearly by this statute of avowry or connusance made upon the land, and not upon the person, which extends as well to nonsuits in replevin or second deliverance, as where the plaintiff is barred; and also as well where the avowry or connusance is for damage feasant, or a rent-charge, as rent-service or customs. D. 141. b. pl. 46. Pasch. 3 & 4 Ph. & M. Anon.

4. 23 H. 8. cap. 15. S. 1. If plaintiff be nonsuit after appearance of the defendant &c. in any action, bill, or plaint, for trespass upon statute of 5 R. 2. or for debt or covenant upon specialty of contract, detinue, account, charging as bailiff or receiver, case, or upon any statute * for any wrong personal immediately supposed to be done to the plaintiff, the defendant shall have judgment

In case the plaintiff was nonsuit, and the defendant had judgment of costs upon this statute, and upon error brought

the record was moved into B. R. and after, the defendant sued an original in debt

ment to recover his costs, to be taxed by the discretion of the judge of the Court where &c. and shall have such process and execution for the same as the plaintiff might have had in case the judgment had been given for him.

for the costs in C. B. And adjudged that it lies very well being upon a new original; and if the record be denied, it shall come by mittimus into the Chancery, but the C. B. may write to an inferior Court; and by two justices against one, *altho' the record be reversed*, he shall have the costs assessed by the Court for the wrong and vexation. D. 32. pl. 5. 6. Pasch. 28 & 29 H. 8. Anon.—S. C. cited per Haughton J. 3 Bulf. 248. Mich. 14 Jac. in case of Small v. Boyer.—S. C. cited per Gawdy, Mo. 625. Hill. 43 Eliz. in case of Ladd v. Wright, that if the plaintiff after nonsuit pays costs, and then reverses the judgment by error, yet the costs shall not be restored, because given for the unjust vexation.—In action on the *case for words*, the plaintiff was nonsuited at the verdict, and he moved that his *declaration is vitious* to save costs, upon the statute of H. 8. and 4 Jac. but it was adjudged, that for his vexation he shall pay costs, tho' in truth he should never have had judgment if the verdict had passed for him. D. 32. b. Marg. pl. 6. cites Pasch. 17 Jac. B. R. Elisden v. Bennet.—S. P. And costs were adjudged; and Hobart Ch. J. said, that the vexation is the more gross, if there was no cause of action; for otherwise one may sue with most safety where he had least cause. Hob. 219. Drury v. Fitch.—Hutt. 16. Pasch. 16. Jac. S. C. and tho' the action would not have lain, yet the defendant shall have costs; for it was such an action in which the plaintiff ought to have costs if he had recovered.—So in an action on the *case against an executor on a promise of his testator*, the Court seemed of opinion, that defendant ought to have his costs upon the statute of H. 8. tho' the declaration be insufficient, but the Court desired to see precedents. Cited 3 Bulf. 14 Jac. Smale v. Boyer.

* In an action upon an *escape*, the plaintiff was nonsuited, and it was held, that defendant should not have costs. 4 Le. 182. pl. 280. Mich. 19 Eliz. in C. B. Anon.—And the Reporter says, nota, the words of this statute are, (for any offence or tort personal to be supposed to be done immediately to the plaintiff). And notwithstanding this action is quodam modo an action upon the statute by the *equity of the statute of W. 1. cap. 11. which gives this action expressly against the warden of the Fleet*, yet properly it is not an action upon the statute; for in the declaration in such an action no mention is made of the statute, which see in the Book of Entries, 169. 171. and also here is not supposed any immediate personal offence or wrong to the plaintiff: and an action upon the *case* it is not, for then the writ ought to make mention of the escape, and that it doth not here, and yet at the common law, before the statute of West. 2. an action upon the *case* lay for an escape, and so by Dyer, Manwood, and Mounson, costs are not given in this case. 4 Le. 182. Mich. 19 Eliz. C. B. Anon.—And by Dyer, upon nonsuit in an action upon the statute of 8. H. 6. the defendant shall not have costs, for it is not a personal wrong; for the writ is, *quod disseisavit*, which is a real wrong. Ibid.—If *debt be brought on the statute of 5 Eliz. of perjury*, and the plaintiff be nonsuit, the defendant shall not have costs by the words (personal wrong &c.) because the statute of 5 Eliz. was made long after the statute of H. 8. and upon the statute of Jac. the defendant shall not recover costs; because if the plaintiff had recovered, he should have recovered no costs; and so no costs were given to the defendant in this action. Brownl. 66. Trin. 16 Jac. King v. Laws.

If an *infant brings trespass by guardian*, and afterwards he is nonsuit, he shall render no costs; per Curiam, absente Wray. Cro. Eliz. 33. Trin. 26 Eliz. in B. R. Grave v. Grave.

It was agreed, that if one brings an action of *debt* upon this statute, in which there is a *demurrer upon matter which goes to the action*, and this demurrer is *adjudged against the plaintiff*, no costs shall be awarded for the defendant by this statute, and yet it is out of the words thereof, and so is the course of the Court, and has been divers times allowed; but if the demurrer goes to the writ, which is *adjudged against the plaintiff*, the defendant shall not have costs as was held H. 26 Eliz. And. 117. pl. 163. Anon.

Debt against an executor upon an obligation made by his testator. The plaintiff was nonsuited; the defendant had costs by order of the Court. Otherwise it is where an executor is plaintiff, and is nonsuited; for it cannot be intended, that it was conceived upon malice by him. Cro. Eliz. 503. Mich. 38 & 39 Eliz. B. R. Fetherston v. Allybon.

Where executors declared upon an *indebitatus assumpsit* to them as executors of J. S. for money had and received to their use as executors. The defendant pleaded non assumpsit, and the plaintiffs were nonsuited at the trial. And the question was, whether they should pay costs upon this statute? and per Cur. the plaintiffs shall pay costs; for the receipt being since the death of the testator, if it was by the consent of the executors, it is the receipt of the executors. And on the other side, if it was without their consent, yet now the bringing this action is a consent; that as to the naming themselves executors, it is only to deduce their right, and set it forth ab origine; yet nevertheless the cause of action articles intirely in their own time, and since the testator's death. It is only by way of construction that an executor is out of this statute; and the reason is, because he is not privy to the original cause of action, but in this case he is. 1 Salk. 207. Hill. 2 Anns B. R. Jenkins & Co.

Ux. v. Plume.—And in either caſe, whether the receipt being ſince the teſtator's death was by the previous appointment or conſent of the executors, or without, yet ſuch conſent in the firſt caſe, and the bringing the action in the ſecond, makes the receipt to be in their own right; per Holt Ch. J. 6 Mod. 91, 92. Hill. 2 Annæ S. C. but adjourned. And Ibid. 181. Trin. 3 Annæ B. R. S. C. adjudged.

Executor brought *affumpſit* for money of his teſtator had and received by the defendant to the uſe of the plaintiff as executor, and was nonſuit. Defendant ſhall not have coſts; for the plaintiff could not ſue but as executor; and it is not material, whether the money was received ſince the death of the teſtator, or before; for if ſince, it is not aſſets till recovered. 1 Salk. 314. Paſch. 2 Annæ B. R. **Eaves v. Macato.**—S. C. cited per Holt Ch. J. 6 Mod. 93. in the caſe of Jenkins v. Plombe, by the name of Elwis v. Mocato, which caſe was then again agreed, becauſe there was no new cauſe of action, but a new action upon an aſcertaining of an ancient cauſe, which aſcertaining leaves it ſtill a debt of the teſtators.

S. 2. Provided that every poor perſon being plaintiff, which at the commencement of their actions be admitted by the judge to have their proceſs and counſel of charity, ſhall not be compelled to pay coſts by this ſtatute, but ſhall ſuffer other puniſhment by the diſcretion of the judge.

The plaintiff was admitted at the commencement of the action in *forma pauperis*,

and before iſſue was diſpauper'd, and then was nonſuited; the queſtion was, whether he ſhould pay coſts within 23 H. 8. cap. 15. and it ſeems that he ſhall not, becauſe the proviſo is, that he who is admitted in *forma pauperis* at the commencement of the ſuit ſhall not pay any coſts. And Coke and Croke were of the ſame opinion; and therefore it was ordered to ſtay till moved of the other part; but Coke ſaid, that in this caſe the ſtatute is, that he ſhall have corporal puniſhment. Haughton J. ſaid, that 4 Jac. . . . is, that if the plaintiff be nonſuited, the defendant ſhall have coſts to be levied as 23 [H. 8.] ordains; by which peradventure this plaintiff ſhall pay coſts; but it ſeems that he is not within the 23 [H. 8.] but Coke and Dod. e contra; for 4 Jac. refers in all to 23 [H. 8.] Man prothonotary ſaid, it had been adjudged here that an execution is not within 4 [Jac.] becauſe it is not within 23 [H. 8.] 1 Roll R. 88. Mich. 12 Jac. Anon.

The plaintiff was admitted in *forma pauperis*, and at nili prius was nonſuited; and it was moved that coſts ſhould be ſpared againſt him; for at common law no coſts ſhall be paid; and the ſtatute 23 H. 8. leaves it to the juſtices. And upon inquiry of the practice in ſuch caſe, it was certified, that the uſual way is to tax coſts, and if the coſts be not paid, that the plaintiff ſhall be whipp'd. But it is in the diſcretion of the Court to ſpare both upon conſideration of the circumſtances of the caſe; but in the principal caſe they awarded that the plaintiff ſhould make his election, to be whipp'd, or to pay coſts. Sid. 261. Trin. 17 Car. 2. B. R. Mundford v. Paic.

It was moved to diſpauper the plaintiff in an action of treſpaſs and ejection, becauſe it was proved by affidavit, that he was a very vexatious perſon, and had been thrice nonſuit in this action, and would never pay coſts, or make a ſufficient leſſee able to pay them. Roll Ch. J. ordered him to put in an able leſſee to pay coſts, or otherwiſe he ſhall not proceed in this action. Sty. [584] 386. Trin. 163. B. R. Anon.

A pauper ſhall not pay coſts, unleſs he be nonſuit, but then he ſhall pay coſts or be whipp'd, per Holt Ch. J. quære tamen; for afterwards, in another term, 'twas moved that a pauper might be whipp'd for non-payment of coſts upon a nonſuit, and the motion was denied per Holt Ch. J. ſaying he had no officer for that purpoſe, and never knew it done. 2 Salk. 506. Mich. 9 W. 3 B. R. Anon.

If a pauper be nonſuit, there ſhall be coſts taxed, and he ſhall not after go on without paying the coſts, or ſhewing according to the Act of Parliament that he was whipp'd; per Cur. Farr. 114. Mich. 1 Annæ B. R. Anon.

A pauper plaintiff having an eſtate fallen to him ſince his being admitted as a pauper, and being taken in execution for the coſts; it was now moved that he might be diſcharged by this ſtatute. And the Court was of opinion, that if the plaintiff was a pauper when the cauſe was tried, he ſhall not pay coſts, and the deſcent of lands to him ſhall not have relation to that time; ſo a rule was made to diſcharge him. 8 Mod. 344. Hill. 11 Geo. Ancell v. Sloman.

5. 24 H. 8. cap. 8. Albeit that the plaintiffs ſhall be nonſuited in any ſuit commenced to the uſe of the King, or that any verdict paſs againſt ſuch plaintiffs, the defendants ſhall not recover coſts againſt ſuch plaintiffs.

6. 8 Eliz. cap. 2. S. 3. Enacts that if any perſon ſhall ſue forth of the King's Bench any latitat, alias. & pluries capias againſt any perſon, who thereupon doth appear, and put in bail, if

1 Le. 105. Mich. 30 Eliz. Bear v. Underwood — See the notes at

pl. 8.— *if the plaintiff do not declare within three days after, or do after declaration delay or discontinue his suit, or be nonsuit, the judges of that Court shall thereupon award damages against the plaintiff.*

Action upon the case upon trover, and conversion of goods was brought by administrator, and declared that J. S. was possessed of goods, and died intestate, and that administration was committed to him, and that the goods by trover came to the possession of the defendant, who converted them; and the conversion was alleged after the time that the administration bore date; the defendant pleaded not guilty, and the plaintiff, after the jury found, was nonsuited; the question in this case was, whether the defendant shall have costs by this statute? and it was held by Jones, Whitlock, and Croke, (absente Hide) that the defendant shall have costs, because action was brought upon a tort done to the plaintiff himself, and there was no occasion for him to be named administrator in this case. 1 Jo. 241. Pasch 7 Car. B. R. Atkey v. Heard. — Cro. C. 219. Trin. 7. Car. B. R. S. C.

7. If the plaintiff be nonsuited, by which the defendant is to recover his costs, if the plaintiff will not enter his continuances on purpose to save the costs, the defendant shall be suffered to enter them, and so recover his costs. See Continuance (E) pl. 3. Pasch. 8 Jac. B. Yeo's Case, per Curiam.

It was adjudged, per tot. Cur. That where executor is plaintiff for a thing touching the testament, and is nonsuit, or verdict passes

8. 4 Jac. 1. cap. 3. S. 2. *If any person shall sue in any Court any action of trespass or ejectione firmæ, or any other action wherein the plaintiff or demandant might have costs if judgment should be given for him, and the plaintiffs or demandants after appearance be nonsuited, or any verdict pass against the plaintiffs or demandants, the defendant shall have judgment to recover costs against such plaintiffs and demandants, to be taxed, and levied, as by Stat. 23 Hen. 8. cap. 15.*

against him, he shall not pay costs upon this statute; for the statute ought to have reasonable intendment, and there cannot be presumed any default in the executor who complains, because it touches another's deed, of which he cannot have perfect notice; and so it was said to be then lately resolved and adjudged by all the justices of C. B. Quod nota, settled judgment by both Courts, contrary to some few precedents which have been in B. R. Quod nota, Yelv. 168, 169. Mich. 7. Jac. B. R. Anon. — S. P. And so it is upon the statute of 8 Eliz. and altho' it was said, that costs had been allowed in the like cases; they appointed that henceforward it should no more be so. Cro. J. 229. S. C. by name of Haywarth v. David. — Ibid. cites it to be so ruled in the Ford's Case. — It was said by Hutton, that it had been agreed in C. B. that if executors are nonsuit, they shall not pay costs within the statute of H. 8. or this statute, and that so is the constant practice; for the statute speaks of any contract, or specialty made with the plaintiff, or between the plaintiff and defendant, and the executor brings an action upon the contract or another, and in the principal case, judgment was entered, that the defendant should go without day, and that he shall not have costs against the plaintiff. Winch. 70. Hill. 21 Jac. C. B. in case of Trehern v. Claybrook. — An executrix brought trespass, and counts of her own possession &c. And it was moved, because the plaintiff was nonsuited, if the defendant shall have costs upon the statute of 23 H. 8. By the Court, the plaintiff shall render costs; for she did not bring the action as executrix, but of goods taken out of her own possession; and so the naming her executrix is nothing to the purpose; ergo within the statute. Noy. 64. the Lady Digby's case. — In remission of writs brought by executors, they were nonsuited; the question was, if they should pay costs; but not adjudged. Hutt. 78. Hill. 1 Car. Townley v. Steele.

[585] Administrator was nonsuited in action brought against J. S. and afterwards brought another action against the same defendant for the same matter; it was ruled that defendant should not have costs, because he brought the action as administrator; and tho' it be said that the debt was due to the testator, yet when he brings it in the detinet, it shall be intended to be brought in right of the testator, and then he shall not pay costs upon nonsuit; for this is out of the statute. Cro. J. 361. Mich. 12 Jac. B. R. Barrett v. Winchcomb. — And in the case of La v. Emme. 2 Bull. 261. Mich. 12 Jac. where the like matter came in question, the Court answered, that according to their former rules the defendant in this case is not to have costs within this statute; for that this statute hath reference to a former statute made in the time of Queen Elizabeth, where in case of an executor plaintiff, and becoming nonsuited, no costs shall be given to the defendant. And so (as man secondary informed the Court) hath been the constant course, and so hath the opinion been of all the judges here before this time; because by the former statute in such a case the defendant was not to have costs, and so not to have any costs by this latter statute of 4 Jac.

Jac. cap. 3. which hath reference to the former; and so by the rule of the Court, the plaintiff in this case being nonsuited was not to pay any costs to the defendant. — The defendant shall not have costs against administrator upon his nonsuit, notwithstanding the general words of this statute. *Per Cur.* and all the clerks. 2 Roll. R. 87. Pasch. 17 Jac. B. R. Valden v. Hunt. — But where executor brought trover, and counted of trover and conversion after death of testator, and after issue join'd was nonsuited, the defendant prayed costs and had it; for the Court held, that the naming the plaintiff executor in this case, is only surplusage. Lat. 220. Mich. 30 Car. Worfield v. Worfield. — S. C. cited and admitted by the Court. Lat. 214. in Case of Hudson v. Hudson.

Nonsuit in ejectment was recorded. Defendant sued for costs upon this statute, and the plaintiff to save his costs alleged insufficiency in his declaration, and insisted, that by the words of the Act, the plaintiff in this action could not recover his costs, by reason of the insufficiency of the declaration, and that therefore the defendant shall not have costs against him upon nonsuit in such action. And upon two precedents produced, the Court advised, and upon conference with the justices of C. B. resolved to pursue this course for the future; for they thought it unreasonable that the plaintiff should take advantage of his insufficient pleading, and by this means a defendant will never have the benefit of this statute; because when the plaintiff has a mind to be nonsuited, he will relinquish his pleading; and costs are given for the vexation of defendant without cause, and that here is vexation. And per Houghton J. the word (*such*) does not mean the same action, but if the plaintiff should have his costs in any other of the same nature; and so the defendant had judgment. Palm. 147. Mich. 18 Jac. B. R. Dove v. Knap.

9. 7 Jac. 1. cap. 5. Gives double costs, where an action is brought against a justice of peace, mayor, or bailiff of a corporation, headborough, portreeve, constable, tythingman, or collector of subsidies, or fifteenths, for any thing done by reason of their several offices, and the verdict pass for the defendant, or the plaintiff be nonsuit &c.

In case against a mayor for refusing to admit the plaintiff to vote at an election of a new mayor, the plaintiff

was nonsuited; the defendant moved for double costs, but the Court held this case not within the intent of the statute. 2 Lev. 250. Pasch. 31 Car. 2. Herring v. Finch.

10. In trespass for a way the defendant pleaded a plea in bar which was insufficient; and afterwards the plaintiff was nonsuit; yet it was resolved by the Court that the defendant should have his costs against the plaintiff. But if a default be in the original writ, and afterwards the plaintiff is nonsuit, there the defendant shall not have costs; because when the original is abated, it is as if no suit had been. And so was the opinion of the whole Court. Godb. 220. Mich. 11 Jac. C. B. Laiston's Case.

11. In an action upon the case, after issue joined, and notice given by the defendant of trial by proviso the plaintiff comes into Court in person the day before the trial, and enters upon the roll a nolle prosequi; and now the defendant prays his costs; and the case was argued for the plaintiff, but no judgment. Hard. 152. Pasch. 1659. Turner v. Gallilee.

12. 13 Car. 2. cap. 2. Sess. 2. S. 3. Enacts that upon an appearance to be entered with the respective officer at the return of the writ, bill, or process, if the plaintiff does not deliver a declaration against the defendant in some personal action or ejectment for lands before the end of the next term following, then a nonsuit shall be entered against such plaintiff, and the defendant shall recover his costs, to be taxed as is provided by the statute 23 H. 8. 15.

13. 17 Car. 2. cap. 7. S. 2. When any plaintiff in replevin shall be nonsuit before issue joined in any of the King's Courts at Westminster, See Rent.

[586] *Westminster, the defendant making a suggestion in nature of an avowry or conusance for such rent to ascertain the Court of the cause of distress, the Court upon his prayer shall award a writ to the sheriff to enquire by the oaths of 12 men touching the sum in arrear at the time of such distress taken, and the value of the goods distrained; and thereupon notice of 15 days shall be given to the plaintiff or his attorney of the sitting of such inquiry; and upon the return of such inquisition the defendant shall have judgment to recover against the plaintiff the arrearages of such rent in case the goods distrained shall amount unto that value, and in case they shall not, then so much as the value of the said goods shall amount unto together with his costs, and shall have execution as the law shall require. And in case such plaintiff shall be nonsuit after conusance or avowry made, and issue joined, or if the verdict shall be given against such plaintiff, then the jurors shall, at the prayer of the defendant, inquire concerning the arrears, and the value of the goods distrained; and thereupon the avowant, or he that makes conusance, shall have judgment for such arrearages, or so much thereof as the goods distrained amount unto, together with his costs.*

14. 4 & 5 W. & M. cap. 18. *If a person, against whom an information shall be exhibited for trespass, battery &c. in the Crown-Office, appear and plead to issue, and the prosecutor do not within a year after issue joined procure a trial, or if upon such trial a verdict pass for the defendant, or the informer procure a nolle prosequi to be entered, the Court shall award the defendant costs, unless the judge certifies that there was reasonable cause for the information.*

15. 8 & 9 W. 3. cap. 11. S. 2. *If any person shall prosecute any action, plaint, or suit, wherein upon a demurrer judgment shall be given against the plaintiff or demandant, or if after judgment for the defendant the plaintiff or demandant shall sue a writ of error, and the said judgment shall be affirmed, the writ of error discontinued, or the plaintiff shall be nonsuit, the defendant or tenant shall have costs, and have execution for the same by ca. sa. fieri facias or elegit.*

S. 3. *And in all actions of waste, debt, upon the statute for not setting out tithes, where the single value or damage found does not exceed 20 nobles, and in suits upon writs of scire facias, and suits upon prohibitions, the plaintiff obtaining judgment or award of execution after plea pleaded, or demurrer joined, shall likewise recover costs, and if the plaintiff be nonsuit, or discontinue, or a verdict pass against him, the defendant shall have costs and execution for the same in like manner.*

[For more of Nonsuit in general, see Appeal, Audita Querela, Default, Error, and other proper Titles.]

* Non-tenure.

• Non-tenure is an exception to a count by saying, that he holdeth not the land specified in the count, or at least some part of it. Reg. Plac. 96. cap. 2.— This is said to be either general or

(A) Pleadable in what Cases or Actions.

1. **I**N *attaint*, the defendant pleaded *general non-tenure*, and if found that it be not &c. that they made a good and lawful oath &c. and this was admitted without challenge. Br. Non-tenure, pl. 35. cites ‡ 16 Aff. 5.

Special. Especial, as that he was not tenant the day whereon the writ was purchased. *General*, that he never was tenant to the land in question. Ibid.

[587] ‡ Ibid. pl. 54. cites S. C. and 6 Aff. 6.— But in *precipe quod reddat* the defendant was barred, and brought *attaint* against the first tenant within half a year after judgment, and because the defendant was not tenant the day of the writ purchased nor after, the writ was abated, but it does not appear that it was pleaded as non-tenure. Br. Non-tenure, pl. 54. cites 6 Aff. 6.

Non-tenure has been pleaded and admitted a good plea divers times in *attaint*. F. N. B. 107. (G).—S. P. Agreed per Cur. And if the tenant pleads non-tenure, the plaintiff may aver him *pernour of the profits*; per Fitzherbert, & non negatur. Br. Non-tenure, pl. 1. cites 26 H. 8. 2. —S. P. per Prisot. Br. Non-tenure, pl. 6. cites 35 H. 6. 44.

2. *Attaint* by Trefred v. Rew and the petit jury, inasmuch as Rew had recovered against him in assise by false oath, and T. appeared and six of the petit jury, and the others made default, and the attaint awarded against them by default. R. pleaded *non-tenure generally*. Ashton said, that R. brought assise against T. and others, and T. pleaded nul tort, and found for the plaintiff falsely, where T. was tenant, and R. recovered by judgment, and entered, and this action is brought within the year after the recovery, and R. made a feoffment to persons unknown to defraud him of his tenant, and averred that R. took the profits the day of the writ purchased; judgment if the writ be not good. Per Newton Ch. J. this is no plea; for the statute depends upon three points, viz. that the action shall be brought within the year, ut supra, and against *pernour of the profits the day of the writ purchased*, and against him who was tenant of the frank-tenement the day of the writ purchased; and it appears that he who is now plaintiff was tenant of the frank-tenement at the time of the action accrued; for the recovery was against him. Paston Contra, and that the action is not accrued till execution be had upon the judgment, and then he who recovered is tenant, and then the action accrued, and not before; and after Prisot demurred for the fault of the third point supra; but after he said that he did not take the profits the day of the writ purchased; and so to issue, & sic ad patriam; and this seems to be by the petit jury, and not by the grand jury; for they shall not go but upon the first matter in issue &c. Br. Parnor, pl. 7. cites 21 H. 6. 55.

3. Non-tenure in *avowry* is no plea; for avowry is good upon

S. P. But he may avoid the seisin at

leged by the defendant, and this is not any non-tenure. Br. Non-tenure, pl. 20. cites 8 H. 6. 16, 17. — S. P. Br. Non-tenure, pl. 53. cites 22 H. 6. 34. And yet issue was taken, if he upon whom the avowry is made had fee the day of the taking or not; for this is a bar to the avowry in effect.

4. If the tenant disclaims in avowry made by his father in Court of record, and after the tenant aliens, a writ of right upon disclaimer lies against him who disclaimed, and yet he is not tertenant. Br. Non-tenure pl. 57. cites 18 H. 6. 25. & Fitzh. Quid Juris clamat. 11.

5. In champerty non-tenure shall not abate the writ. Br. Non-tenure, pl. 17. cites 21 E. 3. 10.

6. Non-tenure is no plea in writ of deceit. Br. Non-tenure, pl. 45.

7. Entry sur disseisin of rent; the tenant said that he is not pernor of the rent, nor tenant of the land whereof &c. nor was the day of the writ purchased, nor ever after. The demandant said, he was seised of the rent till by the defendant disseised, and made a feoffment of the land whereof &c. to persons unknown to defraud him of his tenant, and averred that he took the profits after the disseisin till the day of the writ purchased; and it shall be shewn that the defendant was tertenant at the time of the disseisin; and it was admitted good maintenance of the writ. Br. Parnor, pl. 19. cites 5 E. 4. 35.

Br. Non-tenure, pl. 37. cites 42 Aff. 22 S. P.— Non-tenure [588] was allowed a good plea in error to reverse a fine, and that though he was named tenant in the writ. Br. Error, pl. 27. cites 47 E. 3. 7.

8. In writ of error, per Catesby, non-tenure is no plea; for it shall be brought against the heir or party, tho' he be not tenant; for writ of error shall be brought against him who recovers, and enters, and makes feoffment, or his heir if he be dead, by reason of the privity, be he tertenant or not, and after scire facias shall go against the tertendants. Br. Non-tenure, pl. 42. cites 12 E. 4. 13.

9. The issue in tail, after the discontinuance of his father, entered and made a feoffment to persons unknown, and took the profits, and the issue brought formedon within the year, and he pleaded non-tenure; the demandant shall maintain his writ by the statute, upon the matter shewn, yet the writ shall abate; per Prisot; and yet by his entry the issue is restored to his action. Br. Parnor, pl. 7. cites 21 H. 6. 55.

10. In formedon the tenant pleaded non-tenure, the demandant averred him tenant by pernancy of the profits; and per Cur. he shall shew how the tenant made a feoffment to persons unknown, and took the profits, and shall not say generally that he took the profits; and the feoffment to persons unknown is not traversable, but the taking of the profits. Br. Parnor, pl. 18. cites 4 H. 7. 9.

And it is only to try the privity of blood.

11. Non-tenure in *nuper obiit* is no plea; for the action is in respect of the privity of the blood; per Newton J. Quære. Br. Non-tenure, pl. 18. cites 7 H. 6. 8.

Br. Non-tenure, pl. 51. cites 7 H. 6. 8. Nor is several tenancy any plea; per Newton.

12. In

12. In trespass it was said for law, that in some actions the defendant may say that the plaintiff has nothing in the tenements; as for instance, in *partitione faciend'*, in *warrantia charta*, writ of *mesne*, and *quo warranto*; but Brook says, it seems that it should be in *quo jure*, and not in *quo warranto*. Br. Non-tenure, pl. 11. cites 7 H. 4. 15.

13. In *per que servitia, quem redditum reddit, or quid juris clamat*, non-tenure the day of the writ purchased is no plea, but *shall say*, that *he was not tenant the day of the writ, nor the day of the note levy'd*; per Newton; *quod non negatur*. Br. Non-tenure, pl. 20. cites 8 H. 6. 16, 17.

14. *Præcipe quod reddat*, the tenant said, that he was not tenant the day of the writ purchased, but brought *præcipe quod reddat* against A. of title ancestrell, and recovered, and sued execution by *scire facias* pending the writ, judgment of the writ; and because it is *his own act*, tho' it be by action ancestrell, the writ was awarded good. Br. Brief, pl. 46. cites 41 E. 3. 5.

So where he purchases pending the Writ. Br. Ibid.— Contrary if the land descends to him pending the

writ. Note the Diversity. Br. Ibid.

15. Writ of *quid juris clamat* lies against him who was tenant *tempore finis recogniti*, tho' he be not now tenant; per Markham. Br. Non-tenure, pl. 57. cites 18 H. 6. 25 & Fitzh. *Quid Juris clamat*. 11.

16. Non-tenure is no plea in writ of right of reasonable part; per Briton. Brook says, the reason seems to be because the action is to try the privity of the blood. Br. Non-tenure, pl. 56. cites F. N. B. 9. (N)

17. Non-tenure of parcel shall not abate *scire facias* in tote. Br. Error, pl. 86. cites 24 E. 3. 24. 43.

18. In *scire facias* upon a recovery against a man it is a good plea that the day of the writ purchased he had nothing in the land, without affirming the tenancy in any other; per Wiche. *Quod fuit negatum, quod nota*. Br. Scire Facias, pl. 49. cites * 48 E. 3. 14.

Special non-tenure by villenage, and tenure in villenage the day of the writ

purchased is no plea in *scire facias* upon recovery in *wast*, by the best opinion; nor in *scire facias* upon recovery in *præcipe quod reddat*, without affirming who is tenant. Br. Non-tenure, pl. 9. —Br. Wast, pl. 51. cites 48 H. 8. 18. —And he who pleads recovery in *wast* by default need not aver the party tenant; for non-tenure in this action is no plea. Br. Pleadings, pl. 6. cites 24 H. 8. —Br. N. C. 24 H. 8. pl. 64. S. C. and cites in Marg. 36 H. 6. 29. — In Br. it is misprinted (88).

19. In *scire facias* upon a fine, the tenant said, that he had nothing unless for term of years, and the plaintiff averr'd him pernour of the profits. Br. Non-tenure, pl. 47. cites 5 H. 5. 1.

In scire facias upon a [589] fine non-tenure is no

plea, as it is said there. Br. Non-tenure, pl. 10. cites 7 H. 4. 12.

Scire facias of 20 acres of land, and 10s. rent against defendant, who said, as to ten acres, that J. N. was seised, and infeoffed him and W. P. who is alive not named &c. Judgment of the writ; and to the other 10 acres that R. was seised and leased to him for 13 years, the reversion to R. and so has he nothing in the franktenement, judgment of the writ; and so see special non-tenure admitted in *scire facias*, contra of general non-tenure; and to the 10s. rent, that it is issuing out of four acres of land, of which J. N. was seised before the writ purchased, and leased to the defendant for 11 years, and so has he only a term in the land, the franktenement bring in J. N. absque hoc, that there is any pernour of the rent named in the writ, judgment of the writ. Br. Scire Facias, pl. 110. cites 8 H. 6. 32. —Br. Brief, pl. 434. cites S. C.

For he who made the lease to the tenant, and who the tenant says was seised in fee might

have a release or some discharge which the lessee for years cannot have. Jenk. 15. pl. 26.

Non-tenure generally is no plea in a scire facias. Br. Scire Facias, pl. 107. cites 7 H. 6. 16.— S. P. Br. Faux. Recov. pl. 3. cites 14 E. 4. 2.—* S. P. Br. Nonsuit, pl. 19. cites 7 H. 6. 16, 17. 25.—† S. P. 3 Lev. 205. Mich. 36 Car. 2. C. B. Barret & Trotman.

Br. scire facias, pl. 215. cites 2 C.

20. In *scire facias*, if the defendant pleads *general non-tenure*, the * plaintiff shall have execution at his peril; but contra, if the tenant says that he has only for + term of years, and shews certain, and of whose lease; for this is a special non-tenure. Br. Non-tenure, pl. 48. cites 9 H. 5. 11.

21. *Scire facias* of land upon a recovery in *scire facias* against J. N. the tenant said that J. N. was not tenant of the franktenement the day of the first *scire facias* brought, nor ever after, but one A. whose estate the tenant has, and so the recovery void; and it was held a good avoidance of the recovery, and yet J. N. in the first *scire facias* could not have pleaded non-tenure generally. And it seems, that the recovery was by default; but all is one against this tenant, who was not party to the first writ. Br. Non-tenure, pl. 43. cites 14 E. 4. 2.

Perk S. 60.

22. In *ward*, the defendant pleaded non-tenure of the body, and a good plea. Br. Non-tenure, pl. 10. cites 7 H. 4. 12.

Br. Wast, pl. 33. cites 43 E. 3. 8.

23. In *wast quas tenet* the defendant said that he had nothing in the land the day of the writ purchased, nor after, judgment of the writ; & non allocatur; for non-tenure is no plea in *wast*; per Finch, clearly. Br. Non-tenure, pl. 7. cites 40 E. 3. 33.

24. Where damages are to be recover'd, non-tenure with disclaimer was no plea; for he might injure the demandant, should he be arrested of his damages which the law gives him. G. Hist. C. B. 201. cap. 17.

(B) Pleadings. At what Time it may be pleaded. And after other Plea.

1. **I**N *precipe quod reddat*, the tenant vouched J. S. who came and demanded what he had to bind him to the warranty, and the tenant shewed his own deed, and the vouchee said that he had nothing the day of the writ purchased, nor yet has, judgment, if he may dereign the warranty; and the best opinion was, that because he has demanded the lien, he cannot say after that he is not tenant. Br. Voucher, pl. 28. cites 45 E. 3. 2.

S. P. Br. Non-tenure, pl. 4. cites S. C.— Br. Estoppel, pl. 54. cites 7 H. 4. 8. contra. That the tenant may plead non-

tenure, and shall not be estopped; for non-tenure comes upon the view; per Hanke. quod conceditur.

3. And

3. *And it is said, that after grand cape a man may plead several tenancy or jointenancy, but not non tenure; for if he was not tenant, the default cannot grieve him.* Br. Ibid.

Br. Non-tenure, pl. 4. cites S. C.

4. *In entry in nature of assise of rent, the defendant said, that he was not pernour of the rent the day of the writ purchased, nor ever after; and it was held that he shall say, that he was not pernour of the rent, nor tenant of the land &c. out of which &c. judgment of the writ.* Br. Non-tenure, pl. 39. cites 5 E. 4. 22.

5. *In formedon in defender it was resolved per tot Cur. that non-tenure of all is not pleadable after general imparlance.* 3 Lev. 54. Mich. 33 Car. 2. C. B. Barrow v. Hagget,

(B. 2.) At what Time it may be pleaded. *After what Plea.*

1. **I**T was said, that in *præcipe quod reddat*, if the tenant ** wages his law of non-summons*, by which the writ abates, and the demandant brings a new writ against him, he may plead non-tenure; for he shall have the view, and this plea comes upon the view; but *mirum*, for the ley-gager affirms him to be tenant. Br. Non-tenure, pl. 46. cites 7 H. 4. 8.

* Br. Non-tenure, pl. 2. cites 33 H. 6. 2. *Contra*, that this shall estop him to plead non-tenure in

another writ, as it is said for law.—Br. Estoppel, pl. 13. cites S. C.

2. *If the tenant in præcipe quod reddat pleads jointenancy, this shall estop him to plead non-tenure in another writ, as it is said for law.* Br. Non-tenure, pl. 2. cites 33 H. 6. 2.

Br. Estoppel, pl. 13. cites S. C.—
But where præcipe quod

reddat is brought against the baron and feme, and they plead non-tenure, they shall not be estopped to plead it, because another writ brought against the baron alone was abated by jointenancy, and this writ is brought by Journeys Accounts, and they were tenants the day of the first writ purchased: this is no estoppel to the feme, who was not party to the first writ; and therefore the demandant passed over, and dar'd not wait the estoppel. Br. Non-tenure, pl. 3. cites 33 H. 6. 3.

3. *In cessavit, non tenure of the moiety goes to all the writ, per Littleton and Catesby; for he cannot defend the entire tenements nor tender the arrears for the whole.* Br. Non-tenure, pl. 44. cites 21 E. 4. 25.

(C) Pleadable. *By whom.*

1. **I**N assise it was agreed, that where there is lord and tenant, and the tenant gives in tail parcel of the land, that the assise of mortdancesior brought by the heir of the lord against the feoffor of the entire rent is well brought; for he is tenant to the lord of the entire, and need not to name the tertenant in tail. Br. Non-tenure, pl. 30. cites 8 Aff. 35.

Contra if he had given parcel in fee.
Br. Ibid.

2. *Non-tenure in attain upon assise of fresh force was awarded a good plea, if pleaded by one who was party to the assise of fresh*

fresh force, quod nota. Br. Non-tenure, pl. 16. cites 21 E. 3. 10.

* S. P. Br. Error, pl. 27. cites S. C.—

Contra of the
† *heir; for it*

lies against him, whether he be tertenant or not. Br. Non-tenure, pl. 8. cites 47 E. 3. 7. 8.—† S. P. B. R. Error, pl. 27. cites S. C.—So of the party to the recovery. Br. Non-tenure, pl. 8. cites 47 E. 3. 7. 8.

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But Brook says, that it might be, that he who recovered in the writ of right, had not execution but that J. B. entered, to whom the now plaintiff has released, which cannot be pleaded by this tenor. Br. Ibid.

4. A man recovered land in a Court baron by writ of right, the tenant brought writ of false judgment against the other, and reversed the judgment, and brought scire facias against him who first recovered to have execution, and he said that J. B. was seised and leased to him for term of years, absque hoc, that he was tenant of the franktenement the day of the writ purchased, or ever after, judgment of the writ. Per Catesby, this special non-tenure does not lie for him against whom the judgment was given, as here; but a stranger may have the plea. But per Littleton, he shall have the plea; for it may be that the plaintiff has released to J. B. who infeoffed him; for if he should not have this plea, he would lose his land without any answer; for he cannot plead in bar, because he is not tenant; quod Danby and Needham concesserunt. Br. Non-tenure, pl. 41. cites 8 E.

4. 19.

And if a man recovers in formedon, and brings scire facias against the tenant, he shall not plead non-tenure; per Catesby and

5. It was said, that where a man * recovers by formedon, and the tenant brings attaint against him who recovers, he shall not plead non-tenure; for he was the same party who recovered; for he demands nothing but to have judgment reversed. *Quære* inde; for he shall recover the land. But where it is against a stranger, the writ shall say qui terram illam tenet; contra against party to the first judgment. Br. Non-tenure, pl. 41. cites 8 E. 4. 19.

Jenny. Br. Ibid.—*Contra of the stranger.* Br. Ibid.—* So if a man recovers by assise. And Brook says, the reason seems to be, because he was the same person who recovered the land, and it does not appear there, if the plaintiff in the assise, who recovered, entered or not, or had other execution. Br. Non-tenure, pl. 58. cites 31 H. 6. 12.

S. P. Br. Non-tenure, pl. 16. cites 20 H. 8.—And

6. Non-tenure is no plea in attaint for him who is privy to the first record; per Hare. Br. Non-tenure, pl. 1. cites 26 H. 8. 2. and 31 H. 6. 12.

it seems where a man is barred by false verdict, and brings attaint against the first tenant, non-tenure is no plea; for he is privy. Br. Non-tenure, pl. 6. cites 35 H. 6. 44.—*Contra of a * stranger,* 19 H. 8. As where the tenant infeoffs a stranger after 19 H. 8. Note the diversity; but Wangford said, that non-tenure is no plea in attaint, and this is to be understood as above, as it seems. Br. Ibid.—* S. P. Non-tenure, pl. 16. cites 20. H. 8.

(D) Pleadable

(D) Pleadable. *How. Of all, or Parcel. In what Cases.*

1. **I**N cui in vita, he who pleads non-tenure ought to say, that *he was not tenant the day of the writ purchased, nor ever after*; but of jointenancy, it is sufficient to say, that he held jointly with J. N. not named the day of the writ purchased, of the gift of N. judgment of the writ. Br. Non-tenure, pl. 25. cites 37 H. 6. 16.

2. In *mortdancestor*, the tenant pleaded non-tenure of parcel in bar, and the Court compelled him to answer over to the assise, by which he said, and if found that it be not &c. Br. Non-tenure, pl. 33. cites 12 Aff. 8.——And Brook adds a nota, that *at the common law, non-tenure of parcel should abate all the writ, because it was false in parcel*; and now by the statute of 25 E. 3. *De proditionibus cap. 15.* it shall not abate the writ, but for this part only; *but jointenancy of parcel never was but to the writ for this parcel*; for this affirms the writ true in this, and in more, and does not falsify the writ, as in non-tenure of parcel; note the diversity. Br. Ibid.——Ibid. pl. 50. cites 21 E. 3. 28.

But it was thought very hard that a writ, which was good in part, should be totally destroy'd by this plea; and therefore [by the statute]. 25 E. 3. 16. the writ was abated only for that part of which

non-tenure is alleged. G. Hist. C. B. 201. cap. 17.——If the writ abated in toto at the common law, it was because the tenant could not be summoned in other land. Per Frowike. Kelw. 56. b. pl. 5.

3. *Formedon against coparceners who pleaded severally and one* [592] *said, that where the demand is of the third part of the manor of A. she said that she held so much of the gift and feoffment &c. and that a stranger was seised of two acres of land, and three acres of meadow, parcel of the same manor; [and ill] for she ought to shew who is tenant thereof; and he who pleads non-tenure of parcel, shall say who is tenant thereof; contra if he pleads non-tenure of the whole.* Br. Non-tenure, pl. 52. cites 19 H. 6. 13.

4. In *dower*, the tenant pleaded non-tenure to parcel in such a vill, viz, that he had nothing in it the day of the writ purchased, nor ever after, but J. N. was thereof tenant; and so see that he who pleads non-tenure of parcel shall shew who is thereof tenant; contra of non-tenure of all, elsewhere. Br. Non-tenure, pl. 5. cites 33. H. 6. 51.

But in dower against guardian, if he pleads in bar of part, and that he is not guardian to the rest, he

need not shew who is guardian of the rest; for the writ is not brought against him as tertenant. Br. Ibid.

So where non-tenure of the whole lands is pleaded, the tenant's plea will be good, without shewing who is tenant; for he is brought into Court to answer a demand which he seems to be no way privy to, but utterly disclaims. G. Hist. C. B. 201, cap. 17.

5. In *præcipe of a rent* the tenant demanded the view, and had it, and said that the land put in view, out of which the

* S. P. Ibid.
pl. 52. cites
19 H. 6. 13.

rent is supposed to be issuing, is three mesuages; and as to one mesuage, he answered as tenant, and pleaded hors de son fee, and to the other two, no tenant &c. nor pernour of the rent named in the writ, judgment of the writ, and did * not shew who is tenant thereof, [and well]; per Prisot and Moyle; for this is of another thing, which is not in demand. Br. Non-tenure, pl. 27. cites 36 H. 6. 6.

S. P. Ibid.
pl. 52. cites
19 H. 6. 13
—S. P.

6. But in præcipe of land if the tenant pleads non-tenure of parcel, he shall shew who is tenant of the rest. Br. Ibid.

For they would not suffer a writ that was good in part to be wholly destroyed, except the tenant shewed the demandant how he might have a better writ. G. Hist. of C. B. 201. cap. 17.

Contra where he pleads non-tenure of all. Br. Non-tenure, pl. 27. cites 33 H. 6. 6. — For at the common law non-tenure of parcel goes to all the writ. Br. Ibid. — But in præcipe of rent, Non-tenure of parcel of the land does not go but to the parcel. Br. Ibid.

7. But in præcipe, if the tenant pleads non-tenure, and the demandant avers him pernour of the profits, and he says that he did not take the profits of part, he need not say who took the profits; for the action does not lie against him as tertenant, but as pernour; per Prisot and Moyle. Br. Non-tenure, pl. 27. cites 36 H. 6. 6.

8. If in dower the defendant pleads, that he cannot render the demandant her dower, because he is not thereof tenant, as of the freehold, nor was at the day of the issuing forth the original writ of her the said demandant, nor at any time after. Et hoc parat. est verificare, unde pet' judic' brevis prædict' &c. The demandant may reply, that her writ ought not to be quashed for any thing before alleged; for that the day of issuing forth the original writ of her the demandant, viz. (tale die & anno) the defendant was tenant of the land &c. as of his freehold, as by the same writ is supposed. Reg. Plac. 244. cap 6.

But in præcipe quod reddat of a manor, if the tenant

9. 25 E. 3. Stat. 5. cap 16. Enacts that by the exception of non-tenure of parcel, no writ shall abate, but only for the quantity of the non-tenure which is alleged.

pleads a non-tenure of parcel all the writ shall abate, and so it has been adjudged since this statute; because the manor is a thing intire, in which case the demandant ought to have a forewrit in the writ; and for this reason the judges have held, that it is against reason, that by his demand of the intire manor against one who is only tenant of parcel of the manor, he ought to recover, and therefore have expounded the statute to extend to writs where the things demanded are several, as aforesaid are, and have expounded that it shall not extend to things intire, which exposition is merely against the text; for the text is, that no writ shall abate, and sometimes judges have taken things by the equity of the text contrary to the text to make it agree with reason and equity; per Bromley J. PL C. 109. b. Mich. 2 M. 1. in Case of Fulmerstone v. Steward. — S. P. PL C. 105. a. Patch 2 Eliz. in Case of Stradling v. Morgan.

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Thus in fore-
medon in the
remainder for
the manor
of Dale. if
the demand-
ant enters

10. Tho' a plaintiff cannot destroy, yet he may abridge his demand For since the defendant's pleading non-tenure as to parcel was not to abate the whole writ, but to stand quoad the other part, therefore if the plaintiff had entered into part, and the defendant had pleaded this entry to abate the whole writ, it would not have been a good plea; for it amounted to more than what the

the tenant remained a tenant to ; and when the plea was over-ruled, it was of necessary consequence that the demandant must abridge ; for since the demandant could not go on with the remainder of his writ after such plea, he may go on originally. G. Hist. C. B. 202. cap. 17.

into any part of it, he reverts the whole freehold in himself, and consequently the te-

nant may plead a non-tenure in the whole, which abates the writ since as well as before the statute. G. Hist. C. B. 202. cap. 17.

But if the formedon be for 20 acres, and the demandant enters into six, this is but an abridgment of his demand, and is no more than non-tenure of six acres, so that the writ stands good ; and formerly they made this distinction, that if a demandant brought a writ for two several manors in two several villis, and entered into one, this abated the whole writ, for they were looked upon as two several demands, and the destroying one intire demand was a destruction of the whole writ, being not helped by the statute, but left as if it was at common law. G. Hist. C. B. 202, 203. cap. 17.

But if the demand was for two manors in the same vill, they looked upon them both to be but one demand, being both but parcel of the same place of which the vill was the total ; and therefore the defendant could not plead the entry into one of the manors in abatement of the whole writ ; so the plaintiff might abridge his demand quoad one of the manors, and proceed for that only. G. Hist. C. B. 203. cap. 17.

But the better opinion seems to be, that tho' the manors be in two several villis, yet the plaintiff by entering into one does not abate the writ, because they took the demand of the writ as the total, and the several demands of the writ not as so many independent demands in the writ ; and then the entry into one created a non-tenure of parcel, which was no good plea ; and therefore the plaintiff might well abridge his writ. G. Hist. C. B. 203. cap. 17.

(E) Plea of Non-tenure, avoided How. By Replication.

1. **I**N scire facias the tenant said that the plaintiff was tenant the day of the writ purchased, and yet is, judgment of the writ ; Morice said, this amounted to non-tenure ; per Thorp, the plea is good ; for it may be that you disseised the tenant before the writ purchased, and continued the same disseisin now, and asked if he had any thing else to say. The plaintiff replied, that he was not tenant the day of the writ purchased, nor ever after ; and the other è contra &c. Br. Brief, pl. 532. cites 39 E. 3. 28.

2. Upon non-tenure pleaded, the maintenance of the writ is, that the defendant is tenant as the writ supposed, & de hoc ponit se super patriam &c. and the other the like, and no absque hoc shall be there. Br. Maintenance de Brief, pl. 42. cites Lib. Int.

3. In formedon in remainder the tenant to part pleaded jointenancy, and to the rest disclaimed, the demandant said, that after the death of him by whom he claimed the remainder the tenant entered and made a feoffment to persons unknown to defraud the demandant of his tenant, and that he took the profits the day of the writ purchased, and all times after ; and that the action is brought within the year after the action accrued, and this &c. and by the best opinion, the averment is not good to maintain the writ upon disclaimer ; for the statute serves for non-tenure

tenure in the land, and for jointenancy by the equity, and *contra* for disclaimer; and *where this averment shall take place, the tenant ought to be tenant of the franktenement at the time of the action accrued.* Br. Parnor, pl. 20. cites 5 E. 4. 44. 45.

4. In formedon if the tenant pleads non-tenure, the *demandant* may say that the tenant made feoffment to persons unknown to defraud him &c. and aver that he took the profits, and there the feoffment is not traversable, but the taking of the profits; therefore this feoffment is not peremptory but the taking of the profits. Br. Peremptory, pl. 40. cites 4 H. 7. 9.

[594] 5. In formedon the tenant pleaded non-tenure, the plaintiff said that he was tenant after the death of his ancestor, and made a feoffment to persons unknown &c. and that he took the profits, and that he brought his action within the year after title accrued, and need not say when the alienation was made &c. per Cur. Br. Parnor, pl. 28. cites 7 H. 7. 4.

6. In attaint the defendant pleaded non-tenure; and per Fitzherbert, the plaintiff may aver him pernor of the profits; quod nemo negavit. Br. Parnor, pl. 1. cites 26 H. 8. 62.

7. Anciently, in real actions, there was no damages given where nothing but the freehold was in question; and if the tenant pleaded upon tenure and disclaimer, the plaintiff could not aver his writ and say he was tenant, for by this plea the tenant disclaims all right to the land, so that he can never put up any pretension or demands precedent to his disclaimer, and the demandant is immediately put into possession of his lands, which was the only intent of his writ, & frustra fit per plura, quod fieri potest per pauciora. G. Hist. C. B. 200, 201. cap. 17.

* See (A)
pl. 20.

(F) *Judgment and Execution.* In what Cases after such Plea pleaded the Plaintiff may have Judgment, and sue * Execution at his Peril.

* S. P. The reason is, because the scire facias does not suppose the tenure in the tenant, as the præcipe quod reddat does; for the scire facias is brought to execute a judgment for land or rent, or upon a fine to have execution of it. Jeak. 15. pl. 26.

1. **I**N scire facias, it is said in a nota, that it is a good plea to oust the plaintiff from having execution at his peril, to say that the plaintiff has nothing but a term of years, and set forth the term and lease in certain, which term yet continues, and then he shall not have execution at his peril, but upon * general non-tenure pleaded there he shall have execution at his peril, and may enter at his peril. Br. Scire Facias, pl. 84. cites 9 H. 5. 11.

2. In scire facias, the tenant said that J. N. was seised till by M. disseised, who infeoffed the tenant, and pending this writ N.

N. had entered; judgment of the writ; per Newton this amounts to non-tenure, and non-tenure generally is no plea in *scire facias*, but the plaintiff shall have execution at his peril, which several agreed of non-tenure general, but this plea varies much from that as it seems. Br. Scire Facias, pl. 107. cites 7 H. 6. 16.

3. In *scire facias* upon a judgment in debt against terre-tenants, the sheriff return'd quod *scire feci* J. B. tenenti unius mesuagii &c. And the said J. B. comes and pleads that he is not tenant against the return of the sheriff. Upon demurrer it was adjudg'd for the plaintiff to be no plea, and that the plaintiff might have execution at his peril. Cro. E. 872. Hill. 44 Eliz. Flud. v. Penington.

In *scire facias* against tenants non-tenure was pleaded, and upon the citing this case prayed that the plaintiff

may take judgment or reply, and the Court granted the same accordingly, and said that to special non-tenure he must reply, and not take judgment. 3 Keb. 182. Trin. 25 Car. 2. B. R. Sir Henry Jouningam's Case.

4. Where the non-tenure was without disclaimer, the plaintiff could either aver his writ, or take judgment at his election; for if the demandant would take upon him, that the tenant be tenant to the freehold, he might put it in judgment upon that writ, and the entry is *suo periculo habeat inde executionem*. G. Hist. C. B. 201. cap. 17.

[For more of Non-tenure in general, see *Formedon*, *Jointenants*, and other proper Titles.]

Names [or Names.]

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(A) Names of Men. By what Name he shall be called.

Fol. 135.

[1.] If a man be baptized by one name and confirmed by another name, as if he be christened by the name of Thomas, and confirmed by the name of Francis, he shall be named in actions Francis according to the confirmation, and not according to the christian name. Pasch. 6 Jac. B. 76. and there said by Coke that this was in Judge Gawdy's Case adjudged.]

Co. Litt. 3. a.—A man cannot be named by two christian names, as Evan alias *Jevan Loyd*, and a return of rescous in

such a manner was for that reason held naught. Noy. 135. Loyd's Case.

2. Bishop

2. *Bishop holds deanry in commendam*; in all disputes concerning lands of the dean, he shall be called dean and not bishop. Lat. 235. cites Fitzh. Trial 57.——So where a bishop holds parsonage. F. N. B. 50. (I).

(B) What are *distinct* and several Names.
[Christian Names].

Cro. J. 425.
Pasch. 15.
Jac. B. R.
S. C.

[1. *PIERS* and *Peter* are all one name of baptism; for it appears by the statute ne quis occasionetur pro morte aut reditu Petri Gaveston, and by the chronicle of Holingshead 148. that sometimes Gaveston is called Piers and sometimes Peter in the same statute and the same folio, and so that the names are all one, tho' it was objected that Petrus is the name in Latin, and Piers in French. Mich. 15 Jac. B. R. between Griffith and Middleton, where the case was that Piers Griffith brought audita querela against Middleton upon a statute to avoid it, and defendant pleaded in abatement that he was outlaw'd by the name of Peter Griffith at the suit of J. S. and that he is the same person, and adjudged a good plea for the reason aforesaid. Magna Charta 2 d. Part Eign 46.]

Cro. J. 425.
S. P. in S. C.

[2. *Agnes* and *Ann* are several names of baptism, and not one name. Mich. 15 Jac. B. R. in Griffith and Middleton's Case, agreed per Curiam. Mich. 42, 43 Eliz. B. R. between

* Cro. E.
776. S. C.

* King and King, adjudged in writ of error. Dy. 10, 11 Eliz. 279. 9. between Tirpin and Juxon. H. 18 Eliz. Ret. 738.]

* S. P. Cro.
J. 425. in S.
C. + Cro. E.
776. S. C.
by name of
Hedd v. Chalnor.

[3. * *Jane* and *Jone* are but one name, and not distinct several names. Mich. 15 Jac. B. R. in Griffith and Middleton's Case agreed per Cur. Hill. 32 Eliz. in † Hidd and Chaloner's Case.]

S. P. Cro. J.
425. in S. C.

[4. *Saunder* and *Alexander* are not distinct names of baptism but one name only; for usually Alexander is called Saunder. Mich. 15 Jac. B. R. in Griffith's Case, per Montague said, that he had known it to be so adjudged.]

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[5. *Isabel* and *Sibel* are several distinct names of baptism. 1 Aff. 11. adjudged.]

Cro. J. 477.
S. C.

[6. *Garrat* and *Gerard* are all one name. Camden's Remains 71. Verstegan Pasch. 16 Jac. B. R. between Travers and Gerard Malines it was a question.]

[7. And so *Gerald* is all one name with those. Camden's Remains 71.]

[8. *Randolphus* is not Latin for *Randall*, but they are divers names. Dubitatur M. 31, 32 Eliz. B. R. between Babington and Babington; for *Ranulphus* is his true name.]

[9. *Randulphus* and *Randolphus* is not one name but diverse. Roll R. 271. Mich. 13 Ja. B. R.] Lumley v. Hutton.

[10. *Randolph* and *Ranulph* is not one name but divers. Roll R. 271. Mich. 13 Ja. B. R. between Lumley and Hutton per Curiam.] Lumley v. Hutton.

[11. Sir *John* Hathwaie bound himself by obligation in this manner, *noverint universi me * Jean Hathwaie teneri* &c. This is a good obligation; for this word *Jean*. shall be taken for an abbreviation of *Johannem*, and so one and the same name. Mich. 11 Car. B. R. between Downes and Hathwaie, per Curiam, adjudged upon a special verdict. Intratur Hill. 11 Car. Rot. 195.]

Fol. 136.

* Cro. C. 416 Mich. 11 Car. B. R. S. C. by name of Downs v. Haithwait,

where it is said that the bond and the declaration are *John*, and the roll is *Joas* and Ibid. 418. S. C. and it is there said, that the declaration was *Johannes*, and the obligation is *Joam* without any dash or stroke over, and reported in both places to be adjudged for the plaintiff.

[12. Tho' *James* and *Jacob* are several names, yet *Jacobus* is Latin for both, and shall serve for either of them. Mich. 14 Car. B. R. between Holland and Rigley, per Curiam adjudged: where it was assigned for error that where the writ of summons was returned *responsio Jacobi B.* that there was not any such sheriff named *Jacobus*, yet the judgment was affirmed. But before, in the record, it appears that his name was *Jacob*, which * throughout the whole case is *Jacob*, and *Jacobus* is *James*. Intratur Trin. 14 Car. Rot. 629.]

* Orig. (per tous cases.)

(C) Names of Dignity. What is, and how to be exprefs'd.

1. **I**N quare impedit, it was adjudged that *provost*, *abbot* and *prior* are names of dignity, quod *quare* of *provost*; for it seems to be a name of office, as *parson*, *archdeacon* &c. and yet he ought to be named by this name when any thing is in demand belonging to it. Br. Nosme, pl. 25. cites 24 E. 3.

2. * *Parson* or *priest* is no name of dignity; contra of knight Br. Nosme, pl. 12. cites 11 H. 4. 40.

* S. P. Br. Nosme pl. 14. cites 14

H. 4. 7. in the written Book; contra of a *duke* or *earl*.

3. Wast against *J. A. late wife of W. A. Earl of Arundel*; this is as if he had said Countess of Arundel. Br. Misnomer, pl. 62. cites 2 H. 6. 10, 11.

S. P. because it *tantamounts*, for she cannot be late wife

of W. A. Earl, but she must be countess, unless special matter be shewn to the contrary. Br. Nosmes, pl. 2. cites S. C.

4. *Præcipe* quod reddat to *J. L. knight*. Fulthorp said, he is lord not named lord, judgment of the writ; and because *he was no duke or earle, but a baron*, therefore the writ was awarded good, and so see that * knight is a name of dignity, and baron or such lord not. Br. Nosme, pl. 20. cites 8 H. 6. 10.

A baron shall not be impleaded by name of ba-

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ron; for it is

is no name of dignity, but *shall be named knight if he be a knight, or esquire if he be no knight* where addition is necessary, and yet *he shall be amerced in the Exchequer as a baron* when amercement shall come to be affixed. Br. Nofme, pl. 61. cites 32 H. 6. 29.

* S. P. But *esquire or gentleman are names of worship*; per Newton, which Brook says seems to be a true difference. Br. Nofme, pl. 33. cites 14 H. 6. 15.

5. *Prebend of O. is charged with an Annuity to J. N. by prescription, and the same prebend is annexed to the precentor of E. and yet in the writ of annuity it suffices to name him prebendary and not precentor*; for by the prebend he is charged; per June and Cott. contra per Paston; and if it was appropriated to the abbot, the abbot shall be sued by name of abbot; quod fuit concessum; for it is a name of dignity, but none said that a precentor is a name of dignity. Br. Nofme, pl. 32, cites 14 H. 6. 14.

For it seems that || degree contains in it state, but not è contra, and

6. It seems that *degrees are dignities, as duke, earl, knight, * serjeant at law &c.* for their writ of serjeant is statum & gradum servientis ad legem susceptur. Br. Nofme, pl. 33. cites 14 H. 6. 15.

the State of a man is as gentleman, esquire, yeoman, widow, single woman &c. and the art or craft of a man is his mystery. Ibid.——|| Orig. (Gree).——* S. P. Br. Nofme, pl. 5. cites 35 H. 6. 55.

7. In trespasss defendant said that he was *warden of Guild-Hall of London* the day of the writ purchased, not named &c. Judgment of the writ, & non allocatur; because it is not a name of dignity. Br. Nofme, pl. 21. cites 19 H. 6. 65.

* S. P. Br. Additions, pl. 8. cites 33 H. 6. 9.

8. Bill of premunire against *J. C. Clerk*, he pleaded to the bill, because *he was an archdeacon* not named archdeacon, judgment of the Bill, & non allocatur; for it is * not a name of dignity. Br. Nofme, pl. 4. cites 27 H. 6. 5. and P. 25 E. 3. 41.

9. *Mister and doctör are not names of dignity.* Br. Nofme, pl. 5. cites 35 H. 6. 55.

10. *Dean* is a name of dignity, per Chocke J. contra per Danby Ch. J. and that it suffices to *name him clerk.* Br. Nofme, pl. 43. cites 5 E. 4. 106.——And it is noted there in the margin, that 17 H. 6. is, that dean is no name of dignity. Ibid.

11. *Supremum caput Ecclesiæ Anglicanæ* was omitted in the writ of summons of parliament by *Queen Mary*; resolved by all the judges of England that the writ was good; for it was not part of the name of the Queen, but only an addition. The word Rex comprehends all the attributes and dignities of the King; and the King was defensor fidei in his kingdom before the said statute, as appears by the said statute. Jenk. 209. pl. 42. cites 1 Mar. Dyer 98.

12. In a writ brought the præcipe was *Edwardo domine Windfor de London militi*, and because the word miles was put after his name of dignity the writ abated. Mo. pl. 77. 22 Hill. 3 Eliz. Lord Windsor's Case.

13. A

13. A commission was directed *Thomæ domino Pawlett, & aliis examinand' testes &c.* Sir William Cecil knight lord Burleigh and great treasurer of England said, this is not well directed; for he is not *ld. Pawlett*, but the direction should be *domino Thomæ Pawlett*, and not *Thomæ domino Pawlett*, which in time to come may be questioned what Pawlett is intended; and the clerks were commanded to amend this direction. Sav. 56 pl. 120.

14. A duke, marquess, earl, viscount may be sued by the said names and a baron by the name of *dominus*, not by the name of *baron*; for there are barons of London, barons of the Cinque Ports, and barons of the Exchequer. Judge, bishop, baronet, knight, are all names of dignity; writs brought for them or against them ought to name them so: if a duke, marq. & *c.* be a knight, it is sufficient to name him duke &c. For this greater dignity comprehends in it the knight. A grant made to them ought to be by these names of dignity; for the dignity is parcel of their names. The name *King* surmounts all additions. In the King's grants, his christian name with the word *King*, is sufficient. Jenk. 209. pl. 42. cites 9 Co. 47. the Earl of Shrewsbury's Case.

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15. As the case was stated upon the pleadings in C. B. it appeared that a grant was made to an esquire by the name of knight, whereupon judgment was there given that the grant was void; and error being brought in B. R. it was said by Holt Ch. J. That a man who was reputed a knight, but in truth is not so cannot take any thing by way of grant by the name of knight; for such grant is void, it being a thing in reputation, without any colourable ground for it; but a grant to a duke's eldest son by the name of a marquess, or to the eldest son of a marquess by the name of an earl (et sic de similibus) would be good, because of the common *curtesy of England*, and their places in heraldry; but Rokeby J. contra. But by the three other judges the judgment was affirmed; and thereupon a writ of error was brought in parliament, where this judgment was reversed; for in truth it was only a mistake of the pleader, the grantee being a knight at the time of the grant made. Carth. 440. Hill. 9 W. 3. B. R. the King v. the bishop of Chester, als. Sir William Theackstone's Case.

12 Mod. 185,
187. S. C.
acc. ———
S. P. For
knight is a
name of
dignity and
parcel of a
man's name
as much as
his christian
name. 2
Salk. 561.
S. C.

16. An indictment was preferred against two chairmen for a battery upon Thomas lord marquess of Carmarthen, [eldest son of the duke of Leeds] who was called up to the house of lords by the name of lord Osborn; and it was held by the Ch. J. that there was no such person, or at least the duke of Leeds was the person, and not the prosecutor. So complaint was made in the House of Lords against the marquess of Carmarthen for breach of privilege, and the house said there was no such person: the defendants were acquitted. 2 Salk. 451. Marquess of Carmarthen's Case.

17. So

17. So one was *indicted* at the Old Baily for *stealing the goods of the earl of Kingston*, who was the *eldest son of the marquis of Dorchester*, and the defendant was acquitted by the opinion of all the judges; for he was only Mr. Pierpoint. 2 Salk. 451.

18. Names of dignity are marks of distinction imposed by public authority; and they always make the very name of the person to whom they are given; and they are of two sorts, either of such marks of distinction as exclude the surname, so that the person may not seem to be of any common family, and such are names of earls, dukes &c. that *exclude their surnames*, and by them the parties must plead and be impleaded; otherwise the writ abates. Secondly, they are such marks of distinction as are always imposed by the supreme power, and are parcel of the name itself, but do not exclude the surname, such as knight, baronet, banneret &c. G. Hist. C. B. 190.

[For more of Surnames [or Names] in general, see Statement, Addition, Grant, Disinheritor, and other proper Titles.]

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